TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

No. [redacted] 45

UNITED STATES OF AMERICA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 13, 1956
CERTIORARI GRANTED JANUARY 14, 1957

Supreme Court of the United States

OCTOBER TERM, 1956

No. 574

UNITED STATES OF AMERICA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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[fol. 1] IN THE

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5090

UNITED STATES OF AMERICA, *Appellant*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Appellee*

On Appeal From the United States District Court for the District of Massachusetts

APPELLANT'S RECORD APPENDIX

IN UNITED STATES DISTRICT COURT

RELEVANT DOCKET ENTRIES

1953
May 14 Complaint filed. Summons issued

* * * * *

1954
Feb. 1 Defendant's answer filed

* * * * *

Nov. 3 Defendant's motion to substitute answer filed (Substitute answer annexed thereto)
23 Plaintiff's answers to defendant's counterclaim, filed
26 WYZANSKI, D.J. Motion allowed by agreement—re defendant's motion to substitute answer

[fol. 2] 1955
May 31 Plaintiff's interogatories to the defendant, filed

* * * * *

June 24 Defendant's answers to plaintiff's interrogatories, filed

24 Defendant's objections to plaintiff's interrogatories, filed

Oct. 31 WYZANSKI, D.J. Hearing on defendant's objections to plaintiff's interrogatories, motion for summary judgment for defendant to be filed—Judgment to be entered for plaintiff in accordance with the Memorandum of Court.

31 Memorandum in support of issuance of a pretrial order requiring plaintiff to amend its complaint, filed

Nov. 4 Plaintiff's motion for summary judgment filed with supporting affidavit annexed thereto.

* * * * *

15 Defendant's motion for entry of judgment with defendant's memorandum in support of its motion for entry of judgment, filed

15 WYZANSKI, D.J. Defendant's motion for entry of judgment in its favor, denied.

15 WYZANSKI, D.J. Plaintiff's motion for summary judgment allowed.

23 WYZANSKI, D.J. Upon consideration of plaintiff's motion for summary judgment supported by an affidavit showing one cash payment of $117.77 by the defendant, and allowable credits to the defendant in the sum of $740.19 leaving a balance due plaintiff of $402.84; and upon defendant's motion for entry of judgment on the ground that plaintiff has failed to plead facts entitling it to recover, it is

[fol. 3] Ordered 1—Defendant's motion, denied
2—Plaintiff to recover from the defendant in sum of $402.84.

1956

Jan. 20 Notice of appeal filed by the defendant.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed May 14, 1953

1. The plaintiff is a corporation organized under the laws of Massachusetts, is a common carrier by rail in interstate commerce and is subject to the jurisdiction of the Interstate Commerce Commission.

2. On or about August 8, 1950 the plaintiff delivered a carload of household effects to the defendant at Newport, Rhode Island, thereby completing its performance of a transportation contract signed by the defendant and bearing Government bill of lading number X 17377473.

3. By authority of applicable tariffs duly published and filed with the Interstate Commerce Commission, and of applicable quotations of rates made to the defendant under Section 22 of the Interstate Commerce Act by the plaintiff and prior carriers, the charges lawfully assessable for the transportation services set forth in paragraph two hereinabove are $1,143.03.

4. On or about June 14, 1951 under its bill number F-251856 the plaintiff made demand upon the defendant for payment of $1,143.03 which demand the defendant refused and has continued to refuse. In communicating to the plaintiff its written declinations to pay said $1,143.03, the General Accounting Office of the defendant has made reference to the following Government file numbers in said declinations:

[fol. 4] T-GAO-MRF-470347-12/44-WMW-F-165360
T-GAO-MRF-458243-12/44-WMW-F-13172
T-GAO-MRF-476904-12/44-WMW-F-164498

5. Under the provisions of the Tucker Act, 28 U.S.C., Sec. 1346, the plaintiff therefore demands judgment against the defendant in the amount of $1,143.03 with interest from August 8, 1950 and with costs of this suit.

[Signature omitted]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER—Filed February 1, 1954

Now comes the United States of America in the above-entitled case and answers to the Complaint as follows:

1. The defendant admits the allegations contained in paragraph 1.

2. The defendant denies the allegations contained in paragraph 2 and calls upon the plaintiff to prove the same.

3. The defendant neither admits nor denies the allegations contained in paragraph 3 and calls upon the plaintiff to prove the same.

4. The defendant neither admits nor denies the allegations contained in paragraph 4 and calls upon the plaintiff to prove the same.

5. The defendant denies that it owes the plaintiff the amount alleged in paragraph 5.

[Signature and Certificate of Service omitted]

[fol. 5] IN UNITED STATES DISTRICT COURT

MOTION TO SUBSTITUTE ANSWER—Filed November 3, 1954

Now comes the United States of America in the above-entitled case and moves for leave to strike out its Answer heretofore filed and to substitute therefor the Answer hereto annexed.

[Signature and Certificate of Service omitted]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S SUBSTITUTE ANSWER—Filed November 3, 1954

Now comes the United States of America in the above-entitled case and answers to the Complaint as follows:

1. The defendant admits the allegations contained in paragraph 1.

2. The defendant admits the allegations contained in paragraph 2.

3. The defendant admits the allegations contained in paragraph 3.

4. The defendant denies the allegations contained in paragraph 4 to the effect that the sum of $1,143.03 is due and owing to the plaintiff, but states that of the said sum the plaintiff was allowed the full amount of $1,143.03, with $117.77 being paid by check No. 846000, July 16, 1951, and $1,025.26 being credited, under the provisions of Section 322 of the Transportation Act of 1940, 54 Stat. 898, 955, 49 U.S.C., 66, to overpayments made in the payment of freight charges on plaintiff's bills as follows:

	Bill No. F 131712 amount overpaid	$124.22
	Bill No. F 164498 amount overpaid	169.01
[fol. 6]	Bill No. F 165360 amount overpaid	254.32
	Bill No. F 235076 amount overpaid	477.71

The said overpayments represent for the most part the difference between charges resulting from the use for computation purposes of carload minimum weights based on the size of car furnished and used, and the charges resulting from the use for computation purposes of carload minimum weights based on the size of car ordered by defendant and adequate for the shipment. Plaintiff at no time prior to, or subsequent to, the time of the filing of this suit furnished the defendant with facts with respect to its failure to provide defendant with the car ordered.

5. The defendant denies that it owes the plaintiff the amount alleged in paragraph 5, and demands judgment in its favor and for its costs.

[Signature omitted]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWER TO DEFENDANT'S COUNTERCLAIM—Filed November 23, 1954

Now comes the Plaintiff and makes answer to the counterclaim as alleged in DEFENDANT'S SUBSTITUTE ANSWER:

The plaintiff says that it did receive the check in the amount of $117.77, all as recited by the defendant, leaving

the balance due and to this date unpaid in the amount of $1025.26.

The plaintiff denies that it overcharged the defendant with respect to bills Nos. F 131712, F 164498, F 165360 and F 235076; and the plaintiff further says that the defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 [fol. 7] was in full force and effect and applicable thereto; and the plaintiff further says that it fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation.

[Signature and Certificate of Service omitted]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S INTERROGATORIES ADDRESSED TO THE DEFENDANT—Filed May 31, 1955

The plaintiff hereby serves upon the defendant written interrogatories, as below, to be answered by a duly authorized officer of said defendant under oath and in all other ways pursuant to the provisions of Rule 33 of the Rules of Civil Procedure for the United States District Courts.

1. Please state your name, address, official position, and authority for answering the following interrogatories on behalf of the defendant.
2. Did the defendant enter into a transportation contract with the plaintiff on or about 18 July 1950, being more particularly identified as Government Bill of Lading No. N-17377473?
3. Did the plaintiff complete its performance of the transportation contract, aforesaid, by delivering a carload of household effects to the defendant at Newport, Rhode Island on or about 8 August 1950?
4. Was $1143.03 the lawful charge for the aforementioned transportation services?
5. Did the plaintiff make demand upon the defendant for payment for the aforesaid transportation services on or about 14 June 1951 by presenting its Bill No. F-251856 in the amount of $1143.03?

[fol. 8] 6. (a) Did the defendant pay the aforesaid bill?

(b) If your answer is in the affirmative, please give all details, such as dates, amounts, voucher numbers, etc.

7. Did the defendant enter into a transportation contract with the plaintiff on or about 15 September 1944, being more particularly identified as Government Bill of Lading No. N-8666578?

8. (a) Did that Bill of Lading call for a car of specific size in feet?

(b) If your answer is in the affirmative, please give all the details, including the size of the car and the identification and authority of the agent or agents of the defendant who prepared and signed said Bill of Lading.

9. (a) Was a car of the specified size furnished?

(b) If your answer is in the negative, please give all the details, including the size of the car furnished.

10. Was the car that was furnished the car actually used in the transportation involved?

11. How long did it take to load the car furnished with the goods to be hauled?

12. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?

(b) If your answer is in the affirmative, please give all the details including the name, address, rank (if any), principal duty, and authority of such agent or agents (if more than one, please give details on each).

13. (a) Did the size in feet of the car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?

[fol. 9] (b) If your answer is in the negative, please state when such figures were typed therein and by whom.

14. (a) Was any complaint made about the size in feet of the car furnished being larger than the size in feet of the car ordered?

(b) If your answer is in the affirmative, please give all the details, including the time, date, place and form of such complaint, identifying the agent of

the defendant who made the complaint and identifying the person to whom such complaint was made.

15. (a) Was a car of the size in feet of the car ordered available for the use contemplated by said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

16. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including a certified copy of any report made thereon.

17. Did the plaintiff complete its performance of the transportation contract in Government Bill of Lading No. N-8666578 by carrying two cartons of internal combustion engines from Detroit, Michigan to the defendant at Neponset, Massachusetts?

18. Was $194.26 the lawful charge for such transportation on a car of the size furnished and used?

[fol. 10] 19. Did the plaintiff bill the defendant for such transportation in the amount of $194.26 on its Bill No. E-165360 dated 21 November 1944?

20. (a) Did the defendant pay the plaintiff the said $194.26?

(b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at that time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used and billed.

21. (a) Did the defendant determine that $194.26 was an excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-8666578?

(b) If your answer is in the affirmative, please give all the details, including the date on which the determination was made, the identification and

authority of the person making the determination, and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination, giving all details.

22. (a) With reference to letter of Transportation Division, General Accounting Office of defendant to plaintiff dated 29 March 1951 bearing your reference number T-GAO-Von-470347-12 44-Wakefield dealing with plaintiff's aforesaid Bill No. F-165360, and more particularly with reference to the second paragraph therein, namely, "No authority has been found which authorizes approval of a payment of public monies for services rendered by a carrier in excess of those called for by the bill of lading contract and sufficient for the transportation of the shipment": Did the defendant intend thereby to deny the applicability hereto of Service Order 68, so called?

[fol. 114] (b) If your answer is in the affirmative, please give all the details including the identification and authority of person making such determination.

(c) If your answer is in the negative, what was the purpose of the language quoted above?

23. Was the alleged excess referred to in paragraph 21, above, said to be in the amount of $57.46?

24. (a) Was an amount representing that $57.46 deducted by the defendant from a payment due the plaintiff for subsequent transportation services?

(b) If your answer is in the affirmative, please give all the details, including dates, authority, receipts given, etc.

25. Did the defendant enter into a transportation contract with the plaintiff on or about 15 October 1944, being more particularly identified as Government Bill of Lading No. N-9638610?

26. (a) Did that Bill of Lading call for a car of specific size in feet?

(b) If your answer is in the affirmative, please give all the details, including the size of the car and the identification and authority of the agent or

agents of the defendant who prepared and signed said Bill of Lading.

27. (a) Was a car of the specified size furnished?
(b) If your answer is in the negative, please give all the details, including the size of the car furnished.

28. Was the car that was furnished the car actually used in the transportation involved?

29. How long did it take to load the car furnished with the goods to be hauled?

30. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?

[fol. 12] (b) If your answer is in the affirmative, please give all the details, including the name, address, rank (if any), principal duty and authority of such agent or agents (if more than one, please give details on each).

31. (a) Did the size in feet of car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?
(b) If your answer is in the negative, please state when such figures were typed therein and by whom.

32. (a) Was any complaint made about the size in feet of the car furnished being larger than the size in feet of the car ordered?
(b) If your answer is in the affirmative, please give all the details, including the time, date, place and form of such complaint, identifying the agent of the defendant who made the complaint and identifying the person to whom such complaint was made.

33. (a) Was a car of the size in feet of the car ordered available for the use contemplated by said Bill of Lading?
(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

34. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including a certified copy of any report made thereon.

[fol. 13] 35. Did the plaintiff complete its performance of the transportation contract in Government Bill of Lading No. N-9638610 by carrying 2 cartons of internal combustion engines from Detroit, Michigan to the defendant at Neponset, Massachusetts?

36. Was $166.90 the lawful charge for such transportation on a car of the size furnished and used?

37. Did the plaintiff bill the defendant for such transportation in the amount of $166.90 on its Bill No. F-165360 dated 21 November 1944?

38. (a) Did the defendant pay the plaintiff the said $166.90?

(b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at that time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used, and billed.

39. (a) Did the defendant determine that $166.90 was an excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-9638610?

(b) If your answer is in the affirmative, please give all the details including the date on which the determination was made, the identification and authority of the person making the determination and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination, giving all details.

40. You are hereby asked the same question including parts (a), (b) and (c) as was asked in paragraph 22, above, insofar as it pertains to Bill of Lading No. N-9638610?

41. Was the alleged excess referred to in paragraph 39, above, said to be in the amount of $30.10?

[fol. 14] 42. (a) Was an amount representing that $30.10 deducted by the Government from a payment due

the plaintiff for subsequent transportation service?

(b) If your answer was in the affirmative, please give all the details including dates, authority, receipts given, and all other pertinent data.

43. Did the defendant enter into a transportation contract with the plaintiff on or about 15 October 1944, being more particularly identified as Government Bill of Lading No. N-9638578?

44. (a) Did that Bill of Lading call for a car of specific size in feet?

(b) If your answer is in the affirmative, please give all the details, including the size of the car and the identification and authority of the agent or agents of the defendant who prepared and signed said Bill of Lading.

45. (a) Was a car of the specified size furnished?

(b) If your answer is in the negative, please give all the details including the size of the car furnished.

46. Was the car that was furnished the car actually used in the transportation involved?

47. How long did it take to load the car furnished with the goods to be hauled?

48. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?

(b) If your answer is in the affirmative, please give all the details, including the name, address, rank (if any), principal duty, and authority of such agent or agents (if more than one, please give details on each).

49. (a) Did the size in feet of the car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?

[fol. 15] (b) If your answer is in the negative, please state when such figures were typed therein and by whom.

50. (a) Was any complaint made about the size in feet of the car furnished being larger than the size in feet of the car ordered?

(b) If your answer is in the affirmative, please give all the details, including the time, date, place and

form of such complaint, identifying the agent of the defendant who made the complaint and identifying the person to whom such complaint was made.

51. (a) Was a car of the size in feet of the car ordered available for the use contemplated by said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

52. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including a certified copy of any report made thereon.

53. Did the plaintiff complete its performance of the transportation contract in Government Bill of Lading No. N-9638578 by carrying 2 cartons of internal combustion engines from Detroit, Michigan to the defendant at Neponset, Massachusetts.

54. Was $194.26 the lawful charge for such transportation on a car of the size furnished and used?

[fol. 16] 55. Did the plaintiff bill the defendant for such transportation in the amount of $194.26 on its Bill No. F-165360 dated 21 November 1944?

56. (a) Did the defendant pay to the plaintiff the said $194.26?

(b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at that time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used, and billed.

57. (a) Did the defendant determine that $194.26 was an excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-9638578?

(b) If your answer is in the affirmative, please give all the details, including the date on which the

determination was made, the identification and authority of the person making the determination, and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination; giving all details.

58. You are hereby asked the same question including parts (a), (b) and (c) as was asked in paragraph 22, above, insofar as it pertains to Bill of Lading No. N-9638610.

59. Was the alleged excess referred to in paragraph 57, above, said to be in the amount of $57.46?

60. (a) Was an amount representing that $57.46 deducted by the defendant from a payment to the plaintiff for subsequent transportation services?

(b) If your answer is in the affirmative, please give all the details, including dates, authority, receipts given, etc.

[fol. 17] 61. Did the defendant enter into a transportation contract with the plaintiff on or about 1 February 1944, being more particularly identified as Government Bill of Lading No. N-2579532?

62. (a) Did that Bill of Lading call for a car of specific size in feet?

(b) If your answer is in the affirmative, please give all the details including the size of the car and the identification and authority of the agent or agents of the defendant who prepared and signed said Bill of Lading.

63. (a) Was a car of the specified size furnished?

(b) If your answer is in the negative, please give all the details, including the size of the car furnished.

64. Was the car that was furnished the car actually used in the transportation involved?

65. How long did it take to load the car furnished with the goods to be hauled?

66. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?

(b) If your answer is in the affirmative, please give all the details, including the name, address, rank (if any), principal duty, and authority of such

agent or agents (if more than one, please give details on each).

67. (a) Did the size in feet of the car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?

(b) If your answer is in the negative, please state when such figures were typed therein and by whom.

68. (a) Was any complaint made about the size in feet of the car furnished being larger than the size in feet of the car ordered?

[fol. 18] (b) If your answer is in the affirmative, please give all the details; including the time, date, place and form of such complaint, identifying the agent of the defendant who made the complaint and identifying the person to whom such complaint was made.

69. (a) Was a car of the size in feet of the car ordered available for the use contemplated by said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

70. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the certified copy of any report made thereon.

71. Did the plaintiff complete the performance of the transportation contract in Government Bill of Lading No. N-2579532 by carrying 10 rubbish containers NOIBN 1 box bolts 20 wing nuts 20 spaces 40 in bucket No. 10 from Knoxville, Tennessee to the defendant at Hingham, Massachusetts?

72. Was $417.60 the lawful charge for such transportation on a car of the size furnished?

73. Did the plaintiff bill the defendant for such transportation in the amount of $417.60 on its Bill No.

F-131712 dated 10 April 1944 and resubmitted on 18 November 1944?

74. (a) Did the defendant pay the plaintiff the said $417.60?

[fol. 19] (b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at the time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used and billed.

75. (a) Did the defendant determine that $417.60 was an excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-2579532?

(b) If your answer is in the affirmative, please give all the details, including the date on which the determination was made, the identification and authority of the person making the determination, and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination; giving all the details.

76. (a) With reference to the letter of the Transportation Division, General Accounting Office, of the defendant to the plaintiff dated 2 April 1951 bearing your reference No. T-GAO-Vou-458243-12/44-Wakefield dealing with plaintiff's aforesaid Bill No. F-131712, and more particularly with reference to the second paragraph therein, namely, "No authority has been found which authorizes approval of a payment of public monies for services rendered by a carrier in excess of those called for by the bill of lading contract and sufficient for the transportation of the shipment": Did the defendant intend thereby to deny the applicabiiity hereto of Service Order 68, so called?

(b) If your answer is in the affirmative, please give all the details, including the identification and authority of the person making such determination.

[fol. 20] (c) If your answer is in the negative, what was the purpose of the language quoted above?

77. Was the alleged excess referred to in paragraph 75, above, said to be in the amount of $124.22?

78. (a) Was an amount representing that $124.22 deducted by the defendant from a payment due the plaintiff for subsequent transportation services?
(b) If your answer is in the affirmative, please give all the details, including dates, authority, receipts given, etc.

79. Did the defendant enter into a transportation contract with the plaintiff on or about 15 September 1944, being more particularly identified as Government Bill of Lading No. N-573831?

80. (a) Did that Bill of Lading call for a car of specific size in feet?
(b) If your answer is in the affirmative, please give all the details, including the size of the car and the identification and authority of the agent or agents of the defendant who prepared and signed said Bill of Lading.

81. (a) Was a car of the specified size furnished?
(b) If your answer is in the negative, please give all the details, including the size of the car furnished.

82. Was the car that was furnished the car actually used in the transportation involved?

83. How long did it take to load the car furnished with the goods to be hauled?

84. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?
(b) If your answer is in the affirmative, please give all the details, including the name, address, rank (if any), principal duty, and authority of such [fol. 21] agent or agents (if more than one, please give details on each).

85. (a) Did the size in feet of the car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?
(b) If your answer is in the negative, please state when such figures were typed therein and by whom.

86. (a) Was any complaint made about the size in feet

of the car furnished being larger than the size in feet of the car ordered?

(b) If your answer is in the affirmative, please give all the details, including the date, time, place and form of such complaint, identifying the agent of the defendant who made the complaint and identifying the person to whom such complaint was made.

87. (a) Was a car of the size in feet ordered available for the use contemplated by said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

88. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details including a certified copy of any report made thereon.

89. Did the plaintiff complete its performance of the transportation contract in Government Bill of Lading No. N-5738315 by carrying 1 No. 1 CT-9 tractor crane, 1 No. 1 boom, 2 bxs. spares for CT-9 and T-9, 4 [fol. 22] bxs. Grousers, 1 bx. tools, NOIBN iron from Lee Hall, Virginia to the defendant at Quonset Point, Davisville, Rhode Island?

90. Was $209.95 the lawful charge for such transportation on a car of the size furnished and used?

91. Did the plaintiff bill the defendant for such transportation in the amount of $209.95 on its Bill No. F-164498 dated 14 November 1944?

92. (a) Did the defendant pay the plaintiff the said $209.95?

(b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at that time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used and billed.

93. (a) Did the defendant determine that $209.95 was an

excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-5738315?

(b) If your answer is in the affirmative, please give all the details, including the date on which the determination was made, the identification and authority of the person making the determination, and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination; giving all details.

94. (a) With reference to letter of Transportation Division, General Accounting Office, of the defendant to the plaintiff dated 29 March 1951 bearing your reference No. T-GAO-Von-476904: 12.44-Wakefield dealing with plaintiff's aforesaid Bill No. F-164498, and more particularly with reference to the second paragraph therein, namely, "No authority has been found which author-
[fol. 23] izes approval of a payment of public monies for services rendered by a carrier in excess of those called for by the bill of lading contract and sufficient for the transportation of the shipment"; Did the defendant intend thereby to deny the applicability hereto of Service Order 68, so called?

(b) If your answer is in the affirmative, please give all the details, including the identification and authority of the person making such determination.

(c) If your answer is in the negative, what was the purpose of the language quoted above?

95. Was the alleged excess referred to in paragraph 93, above, said to be in the amount of $80.35?

96. (a) Was an amount representing that $80.35 deducted by the defendant from a payment due the plaintiff for subsequent transportation services?

(b) If your answer is in the affirmative, please give all the details, including dates, authority, receipts given, etc.

97. (a) Did the Secretary of War on or about 30 October 1943 petition the Interstate Commerce Com-

mission to amend Service Order 68, so called, so as to exempt from the effect thereof shipments to or by any organization or installation of the War Department insofar as said Service Order 68 suspended paragraphs 2 (a) and 6 (a) of Rule 34 of Consolidated Freight Classification No. 14?

(b) If your answer is in the affirmative, please give all the details, enclosing a certified copy of such petition, together with certified copies of any orders issued by said Commission in reference to such petition, and for a certainty a certified copy of the order of said Commission disposing of said petition.

[Signature and Certificate of Service omitted]

[fol. 24] IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES—Filed June 24, 1955

William Levenstein having been duly sworn, makes the following answers to interrogatories served upon defendant in the above-entitled case.

1. Affiant is William Levenstein, 2907 56th Place, Cheverly, Maryland, whose official position is Transportation Specialist, Special Reports Section, Transportation Division, United States General Accounting Office, Washington, D.C., among whose official duties is the preparation of answers to interrogatories served upon the United States involving litigation arising under Section 322 of the Transportation Act of 1940 (54 Stat. 955; 49 U.S.C. 66).

5. Yes.

6. (a). Yes.

(b). The sum of $177.77 was paid to plaintiff by United States Treasury check No. 846000 dated July 16, 1951. The balance of $1,025.26 was paid to plaintiff by means of credits because of overpayments made to plaintiff in payment of freight charges on plaintiff's bills numbered: F-131712, F-164498, F-165360 and F-235076.

7. Yes.

8 (a). Yes.

(b). Bill of Lading No. N-8666578 called for an open freight car forty feet in length. Said Bill of Lading was prepared and signed in the performance of official duties by Lt. (j.g.) E. V. Weissbrodt, USNR, in behalf of R. Velz, Captain, USN (Ret.) Officer and Inspector of Naval Material, Bureau of Supplies and Accounts, Navy Department, Detroit, Michigan.

9 (a). No.

(b). In lieu of the forty foot car ordered a forty-six foot car was furnished for reasons peculiarly within the [fol. 25] knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway and defendant is without knowledge of the reasons for the failure to furnish the forty foot car ordered.

10. Yes.

13 (a). Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on said Bill of Lading.

15 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway.

17. Yes.

18. Yes, however, $194.26 was not the lawful charge for *the* car furnished by the initial carrier.

19. Yes.

20 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 37812 on or about December 18, 1944.

21 (a). Yes.

(b). On or about November 7, 1950, in performance of their official duties Ralph Gertler and Meredith A. Palmer, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, determined that $194.26 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the forty foot car ordered and not for payment of charges for the forty-six foot car furnished.

(c). Defendant notified plaintiff of such determination on or about November 7, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of

$57.46 for transportation services in connection with Bill of Lading No. N-8666578.

[fol. 26] 22 (a). Yes.

(b). The letter referred to in 22 (a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Transportation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

23. Yes.

24 (a). Yes.

(b). The sum of $57.46 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt. S.C., USN, Disbursing Officer in the performance of his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

25. Yes.

26 (a). Yes.

(b). Bill of Lading No. N-9638610 called for an open freight car forty feet in length. Said bill of lading was prepared and signed in the performance of official duties by Lt. (j.g.) E. V. Weissbrodt, USNR, in behalf of R. Velz, Captain, USN (Ret.) Officer and Inspector of Naval Material, Bureau of Supplies and Accounts, Navy Department, Detroit Michigan.

27 (a). No.

(b). In lieu of the forty foot car ordered a forty-two foot car was furnished for reasons peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway and defendant is without knowledge of the reasons for the failure to furnish the forty foot car ordered.

28. Yes.

31 (a). Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on said Bill of Lading.

[fol. 27] 33 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway.

35. Yes.

36. Yes, however, $166.90 was not the lawful charge for *the* car furnished by the initial carrier.

37. Yes.

38 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 37812 on or about December 18, 1944.

39 (a). Yes.

(b). On or about November 7, 1950 in performance of their official duties Ralph Gertler and Meredith A. Palmer, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, determined that $166.90 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the forty foot car ordered and not for payment of charges for the forty-two foot car furnished.

(c). Defendant notified plaintiff of such determination on or about November 7, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of $30.10 for transportation services in connection with Bill of Lading No. N-9638610.

40 (a). Yes.

(b). The letter referred to in 40 (a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Transportation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

41. Yes.

[fol. 28] 42 (a). Yes.

(b). The sum of $30.10 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt., S.C., USN, Disbursing Officer in the performance of his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

43. Yes.

44 (a). Yes.

(b). Bill of Lading No. N-9638578 called for an open freight car forty feet in length. Said bill of lading was prepared and signed in the performance of official duties by Lt. (j.g.) E. V. Weissbrodt, USNR in behalf of R. Velz, Captain, USN (Ret.) Officer and Inspector of Naval

Material, Bureau of Supplies and Accounts, Navy Department, Detroit, Michigan.

45 (a). No.

(b). In lieu of the forty foot car ordered a forty-six foot car was furnished for reasons peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway, and defendant is without knowledge of the reasons for the failure to furnish the forty foot car ordered.

46. Yes.

49 (a). Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on said Bill of Lading.

51 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway.

53. Yes.

54. Yes, however, $194.26 was not the lawful charge for *the* car furnished by the initial carrier.

[fol. 29] 55. Yes.

56 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 37812 on or about December 18, 1944.

57 (a). Yes.

(b). On or about November 7, 1950 in performance of their official duties Ralph Gertler and Meredith A. Palmer, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, determined that $57.46 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the forty foot car ordered and not for payment of charges for the forty-six foot car furnished.

(c). Defendant notified plaintiff of such determination on or about November 7, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of $57.46 for transportation services in connection with Bill of Lading No. N-9638578.

58 (a). Yes.

(b). The letter referred to in 58(a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Trans-

portation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

59 Yes.

60 (a). Yes.

(b). The sum of $57.46 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt., S.C., USN, Disbursing Officer in accordance with his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

61. Yes.

[fol. 30] 62 (a). Yes.

(b). Bill of lading No. N-2579532 called for an open freight car 52 feet in length. Said bill of lading was prepared and signed in the performance of official duties by I. J. Pherson, Resident Inspector of Naval Material, Knoxville, Tennessee.

63 (a). No.

(b). In lieu of the fifty-two foot car ordered a sixty-five foot car was furnished for reasons peculiarly within the knowledge of plaintiff and/or the initial carrier, the Southern Railway Company and defendant is without knowledge of the reasons for the failure to furnish the fifty-two foot car ordered.

64. Yes.

67 (a). Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on said Bill of Lading.

69 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and/or the initial carrier, the Southern Railway Company.

71. Yes.

72. Yes, however, $417.60 was not the lawful charge for *the* car furnished by the initial carrier.

73. Yes.

74 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 368459 on or about December 11, 1944.

75 (a). Yes.

(b). On or about November 21, 1950 in performance of their official duties Ralph Gertler and Lois A. Gammage, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, [fol. 31] determined that $417.60 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the fifty-two foot car ordered and not for payment of charges for the sixty-five foot car furnished.

(c). Defendant notified plaintiff of such determination on or about November 21, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of $124.22 for transportation services in connection with Bill of Lading No. X-2579532.

16 (a). Yes.

(b). The letter referred to in 76 (a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Transportation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

77. Yes.

78 (a). Yes.

(b). The sum of $124.22 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt., S.C., USN, Disbursing Officer in the performance of his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

79. Yes.

80 (a). Yes.

(b). Bill of Lading No. X-5738315 called for an open freight car forty feet in length. Said Bill of Lading was prepared and signed in the performance of official duties by Ensign J. A. Nellor, USNR in behalf of Commander L. C. Fuller, S.C., USN, Supply Officer U.S. Naval Mine Depot, Yorktown, Virginia.

81 (a). No.

(b). In lieu of the forty foot car ordered a fifty foot car was furnished for reasons peculiarly within the knowledge of plaintiff and/or the initial carrier, the Chesapeake [fol. 32] and Ohio Railway Company, and defendant is without knowledge of the reasons for the failure to furnish the forty foot car ordered.

82. Yes.

85. Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on the Bill of Lading.

87 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and or the initial carrier, the Chesapeake and Ohio Railway Company.

89. Yes.

90. Yes, however, $209.95 was not the lawful charge for *the* car furnished by the initial carrier.

91. Yes.

92 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 373738 on or about December 21, 1944.

93 (a). Yes.

(b). On or about September 1, 1950 in performance of their official duties Ralph Gertler and Meredith A. Palmer, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, determined that $80.35 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the forty foot car ordered and not for payment of charges for the fifty foot car furnished.

(c). Defendant notified plaintiff of such determination on or about September 1, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of $80.35 for transportation services in connection with Bill of Lading No. N-5738315.

[fol. 33] 94 (a). Yes.

(b). The letter referred to in 94 (a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Transportation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

95. Yes.

96 (a). Yes.

(b). The sum of $57.46 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt., S.C., USN.

Disbursing Officer in the performance of his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

/s/ William Levenstein
WILLIAM LEVENSTEIN

June 16, 1955

Sworn to before me this 16th day of June, 1955.

DOROTHY R. NIEMANN
Notary Public
My Commission Expires Aug. 14, 1956

(Seal)

IN UNITED STATES DISTRICT COURT

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S INTERROGATIONS—
Filed June 24, 1955

Comes now defendant, pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure (Title 28 U.S.C.) and for the reasons set forth in the attached memorandum, objects to the following numbered interrogatories served upon defendant:
[fol. 34] 2, 3, 4, 11, 12(a), 12(b), 14(a), 14(b), 16(a), 16(b), 20(b) [in part], 29, 30(a), 30(b), 32(a), 32(b), 34(a), 34(b), 38(b) [in part], 47, 48(a), 48(b), 50(a), 50(b), 52(a), 52(b), 65, 66(a), 66(b), 68(a), 68(b), 70(a), 70(b), 74(b) [in part], 83, 84(a), 84(b), 86(a), 86(b), 88(a), 88(b), 92(b) [in part], 97(a) and 97(b).

[Signatures omitted]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF HEARING ON DEFENDANT'S OBJECTIONS TO PLAINTIFF'S INTERROGATORIES—October 31, 1955

* * * * *

2 The Clerk. Civil Action 53-560, The New York, New Haven & Hartford Railroad Company v. United States.

The Court. This is the New Haven case. I have read the briefs.

Mr. Urbano. Your Honor, may I present to the Court Mr. James Prentice from the Department of Justice, who will represent the government in this matter.

The Court. Very glad to have you, sir.

Mr. Prentice. Thank you.

The Court. I have looked at the papers, so you may proceed. Defendant's objections to plaintiff's interrogatories, and there is some request?

Mr. Prentice. Yes, your Honor. Actually the government has requested a pretrial conference on this matter.

The Court. Yes, I will hear you on the whole thing because I have read the statement. I assume Mr. Sweeney has had an ample opportunity to examine it. Have you?

Mr. Sweeney. Yes, I have. But I also have not had adequate opportunity to resist their pressing for a pretrial. I wrote them letter after letter, and I would prefer not to be badgered into a pretrial.

The Court. I didn't say I was going to give a pretrial but this is argument as to why I should give a pretrial.

[fol. 35] Mr. Prentice. May I approach it first, your Honor, from the view of why we should have a pretrial?

The Court. All right. It seems to me a very simple case.

Mr. Prentice. I didn't say it is complex. I believe if we have a pretrial conference which will resolve the issues between the parties with respect to the burden of proof, we can have a comparatively quick decision in this case and many other cases in this court between the carriers.

The Court. It seems to me to be a perfectly simple case. It is a suit upon a contract in which the defendant has other claims arising by way of, literally, of setoff or its equivalent under contract law. It is not a suit in quasi contract: it is a suit upon the contract. Is that not so?

Mr. Prentice. I believe that is correct, your Honor.

The Court. And in a suit upon the contract is it not so that if there is any attempt to set off other contractual claims, whoever attempts to set off the other contractual claims has the burden of showing there are other claims?

Mr. Prentice. Not the way we look at it, your Honor. We believe this is an action by carriers to recover money wrongfully withheld authorized by statute, and in showing it is entitled to this money it must show they were wrongfully withheld and it is entitled to the money. The plaintiff sues upon a contract as to which there is no dispute between the parties at all, and there could be
4 no dispute because the statute authorized only that deductions be made where sums are otherwise due to the carrier. There could be no dispute. The carrier is asserting the government erred in withholding moneys which it says are due it. We believe it is the carrier's duty to plead facts and to prove that it is entitled to this money which it is claiming.

The Court. As I understand it, your view is that the carrier must bear the burden of showing that from the beginning of the world to the date of these presents there are no claims which the United States has against it. Isn't that your view?

Mr. Prentice. I don't think it is quite that broad, your Honor.

[fol. 36] The Court. Why?

Mr. Prentice. We say this is one continuing transaction with respect to these wartime contracts.

The Court. Why?

Mr. Prentice. Because it had elements permitted by statute; first, the shipment was made, the carrier presented a bill; the government had no opportunity to then decide whether it agreed to it; the statute then said, you will review it after payment; then you will state to the government what your position is as to the rate; you then negotiate with the carrier and if they do not agree you are stuck. That to me is one series of contractual negotiations delayed because of the fact of prompt payment upon presentation; negotiations on the contract are de-
5 layed until after payment, which is unusual but the statute requires it. We are here now because we have never agreed as to the contract rate. We have never agreed upon the rate furnished in the contract. The plaintiff comes into court—

The Court. Oh, I think there is no doubt there are complex problems involving other contracts; but that isn't

the issue which is at the moment raised. The issue which is just at the moment raised is whether the plaintiff must show anything except the liability of the government with respect to this alleged contractual obligation.

Mr. Prentice. That's exactly right, your Honor.

The Court. That is the only issue.

Mr. Prentice. That's exactly right.

The Court. I don't care how complicated the other contracts are.

Mr. Prentice. That's exactly right. I do not contest that. We maintain—and, as a matter of fact, that may be correct. Whether the Court rules whichever party must plead the facts we still come to a separate argument on burden of proof. But we believe these cases may be more easily disposed of if the burden is placed on the carriers. If they must plead it they must prove it. It is a little more complex if we must plead it and they must prove it. But that may prove to be the fact. It may be the law.

I agree with [fol. 37] what your Honor said.

Where the particular factual issue involves a matter that is solely and peculiarly within the knowledge of the carrier, the government could not prove a peculiar factual issue—whether the carrier had available the cars ordered by the government ten years ago. We could not prove that. And yet if the burden is on the government to plead and prove that it is entitled to make the deductions, that would seem to follow to be the result. What we would like, in order as soon as possible to dispose of this case and the others, I would like to have Mr. Sweeney agree the judgment in this case may be entered against the party on whom the Court rules rests the burden of proof. I have not been able to.

The Court. Well, I think he may be able to agree in a moment because as far as I can see there is nothing to your point, and therefore I am quite prepared to enter judgment for the plaintiff, so I don't think he is going to oppose it.

Mr. Prentice. If that could be done and judgment should be entered and an opinion written—

The Court. I'm not going to write any opinion. I'm just going to send it right up if you don't like it.

Mr. Prentice. Well, we would like to do that, your Honor.

The Court. All right.

Mr. Prentice. Because we feel the question is important.

The Court. You don't object, do you?

Mr. Sweeney. No, sir.

The Court. All right. Well, you had better put it in the formal way of a motion, which I think you haven't got in the record here.

Mr. Prentice. That is true.

The Court. And the moment the motion is formally filed I am going to deny it, and I am going to receive a countermotion which is a motion for summary judgment, fortified by affidavit, which you are not going to oppose but you are only going to oppose the view of the law that I have taken here. Isn't that right?

Mr. Prentice. If I may be correct, I assume it is your Honor's holding that the government will have the burden [fol. 38] of showing in this particular category the facts respecting deductions; in other words, the government must show that the carrier was unable to supply the cars furnished by the government.

The Court. No, I am not saying any such thing as that. Quite to the contrary. What I am saying is that where the New York, New Haven & Hartford brings a suit against the United States which is upon a particular contract of carriage it is not the obligation of the plaintiff in that suit to set forth all the previous contracts of carriage which have existed between the New York, New Haven & Hartford and the United States which may give rise to some claims of the United States against the New York, New Haven & Hartford Railroad.

Mr. Prentice. The government didn't content that, your Honor.

The Court. Well, that is the gist of the contention.

Mr. Prentice. No, the contention was the carrier had previous contracts for which the deductions were made.

The Court. Oh.

Mr. Prentice. That means just three or four contracts.

The Court. All right. I say the obligation rests upon

the defendant, the United States, in its pleadings, to set forth the claims which it regards as setoff or similar basis for the reduction of the amount otherwise recoverable by the plaintiff on the principal contract.

Mr. Prentice. It doesn't necessarily follow that your Honor is ruling on the burden of proof question.

The Court. I am most certainly not ruling on the burden of proof.

Mr. Prentice. That is what I want to be clear on, your Honor.

The Court. Yes. You understand that too, don't you, Mr. Sweeney?

Mr. Sweeney. I do, your Honor. But I understand, I think I understand that the reason why you are not ruling is because you are disposing of the case without such a ruling.

9 The Court. That is correct. And now I'm just going to dictate a short two paragraphs so that [fol. 39] there can be no doubt in the minds of the Court of Appeals about what I have to say.

Mr. Prentice. I will be grateful.

The Court. This is a suit brought by the New York, New Haven & Hartford Railroad Company to recover sums alleged to be due from the United States of America on account of a shipment on August 8, 1950, which defendant carried pursuant to government bill of lading No. N-17377473. The tariff rate for this shipment was $1,143.03. The plaintiff, on June 14, 1951, made demand upon the defendant for payment of that sum, which defendant refused and has continued to refuse to pay. Pursuant to the provisions of the Tucker Act (28 USC 1346) plaintiff brought suit in this court.

The defendant contends that the plaintiff is not entitled to recover anything unless it shows that the government has not made overpayments on prior transportation contracts and designated bills which are referred to in defendant's answer.

I rule as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plainti-

tiff. This is a suit upon a particular contract of transportation. Other contracts claimed by way of set-
10 off or otherwise must be set up in the defendant's answer and proved by the defendant.

The Court: Is that clear enough?

Mr. Prentice. Yes, it is, your Honor.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed November 4, 1955

1. Plaintiff moves that Summary Judgment be entered in its favor against the defendant in the sum of Four Hundred [fol. 40] and Two Dollars and Eighty-four Cents ($402.84), being the balance now due under the transportation contract set forth in the Complaint (See Affidavit attached hereto as Exhibit No. 1); together with interest lawfully allowable under 28 U.S.C.A. 2411; and costs allowable under 28 U.S.C.A. 2412.

2. If judgment is not rendered in Plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, the Plaintiff moves that the Court at the hearing on the Motion, by examining the pleadings and evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

3. This Motion is based upon the following:

(a). Complaint;
(b) Defendant's Answer and Substitute Answer;
(c) Plaintiff's Answer to Defendant's Counterclaim;
(d) Plaintiff's Interrogatories Addressed to Defendant; and
(e) Defendant's Answers and Objections to Plaintiff's Interrogatories;
(f) Affidavit of Plaintiff's Auditor.

4. The following facts are established:

(a). The plaintiff is a corporation organized under

the laws of Massachusetts; is a common carrier by rail in interstate commerce and is subject to the jurisdiction of the Interstate Commerce Commission. See Complaint, paragraph 1; Defendant's Substitute Answer, paragraph 1.

(b) On or about August 8, 1950 the Plaintiff delivered a carload of household effects to the Defendant at Newport, Rhode Island, thereby completing its performance of a transportation contract signed by the [fol. 41] Defendant and bearing Government Bill of Lading number X-17377473. See Complaint, paragraph 2; Defendant's Substitute Answer, paragraph 2.

(c) By authority of applicable tariffs duly published and filed with the Interstate Commerce Commission and applicable quotations of rates made to the Defendant under Section 22 of the Interstate Commerce Act by the Plaintiff and prior carriers the charges lawfully assessable for such transportation services were $1143.03. See Complaint, paragraph 3; Defendant's Substitute Answer, paragraph 3.

(d) On or about June 14, 1951 under its bill number F-251856 the Plaintiff made demand upon the Defendant for payment of $1143.03 which demand the Defendant refused to pay except the amount of $117.77. See Complaint, paragraph 4; Defendant's Substitute Answer, paragraph 4; Affidavit of Plaintiff's Auditor.

(e) In addition to the payment of $117.77 which the Defendant made against the Plaintiff's demand for $1143.03 (leaving as it would a balance of $1025.26) the parties by adjustment outside this action have agreed that the Defendant should be allowed a credit of $622.42 against said balance of $1025.26; which said computations result in a remaining balance due of the amount of $402.84. See Affidavit of Plaintiff's Auditor.

5. Plaintiff respectfully requests that judgment herein be entered nunc pro tunc the thirty-first day of October 1955.

[Signature and Certificate of Service omitted]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ASSISTANT AUDITOR OF FREIGHT RECEIPTS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Raymond S. Aldrich of Hamden in the State of Connecticut, being put upon oath do depose and say:

[fol. 42] 1. I am the Assistant Auditor of Freight Receipts for The New York, New Haven and Hartford Railroad Company with offices at New Haven, Connecticut.

2. The records of this Company disclose the following:

(a) On or about June 14, 1951 under Number F-251856 this Company billed the Government in the amount of $1,143.03 for transportation under Bill of Lading No. N-17377473;

(b) On or about July 16, 1951 Government check No. 84600 in the amount of $117.77 was received by this Company and credited against the outstanding amount of $1,143.03;

(c) No other cash payment against said outstanding has been made.

(d) The following items of credit have been agreed upon through administrative negotiation outside the scope of this action:

(1) Against Bill No. F-165360:	$109.30
(2) Against Bill No. F-164498:	169.01
(3) Against Bill No. F-235076:	344.11
Total:	622.42

(e) The balance still due and owing to this Company at this time is $402.84.

3. I make the within statements with full knowledge that this affidavit is to be offered in support of Plaintiff's Motion for Summary Judgment in the

action on this matter now pending in the Federal Court for Massachusetts.

Dated at New Haven, Connecticut
this 3rd of November 1955

/s/ R. S. ALDRICH
Assistant Auditor of Freight Receipts.

[fol. 43] STATE OF CONNECTICUT
NEW HAVEN, ss November 3, 1955.

Personally appeared the above named Raymond S. Aldrich in his capacity as Assistant Auditor of Freight Receipts for The New York, New Haven and Hartford Railroad Company and made oath that the above statement by him subscribed is true.

Before me,

/s/ EDWARD C. BROOKS
Notary Public

My commission expires: April 1, 1957.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT—Filed November 15, 1955

Comes now defendant by its attorneys and moves that the Court enter judgment in its favor herein on the ground that defendant is entitled to judgment as a matter of law in that plaintiff has failed to plead facts entitling it to recover herein.

[Signatures omitted]

IN UNITED STATES DISTRICT COURT

JUDGMENT—Entered November 23, 1955

WYZANSKI, D.J. Upon consideration of plaintiff's Motion for Summary Judgment supported by an affidavit showing one cash payment of $117.77 by the defendant and allowable credits to the defendant in the sum of $740.19 leaving a balance due plaintiff of $402.84; and

upon defendant's motion for entry of judgment on the ground that plaintiff has failed to plead facts entitling it to recover, it is

[fol. 44] ORDERED:

1—Defendant's motion denied
2—Plaintiff to recover from the defendant the sum of $402.84.

BY THE COURT:
/s/ GRACE V. FLOOD
Deputy Clerk.

November 23, 1955
/s/ WYZANSKI
United States District Judge.

Judgment entered Nov. 23, 1955
JOHN A. CANAVAN, *Clerk*
by /s/ GRACE V. FLOOD
Deputy Clerk

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 20, 1956

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on November 23, 1955.

[Signature omitted]

[fol. 45] PROCEEDINGS IN COURT OF APPEALS

* * * * *

ARGUMENT AND SUBMISSION OF CASE—May 1, 1956

[fol. 47] UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5090.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLANT,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before. MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Alan S. Rosenthal, Attorney, Department of Justice, with whom *Warren E. Burger*, Assistant Attorney General, *Anthony Julian*, United States Attorney, and *Melvin Richter*, Attorney, Department of Justice, were on brief, for appellant.

Edmund M. Sweeney for appellee.

OPINION OF THE COURT—August 10, 1956

MAGRUDER, *Chief Judge*. This is an appeal from a summary judgment in favor of the New York, New Haven and Hartford Railroad Company against the United States in the sum of $402.84. Though the amount involved is small, this is a test case, determination of which will settle the government's liability in a number of similar suits.

In 1953 plaintiff Railroad filed its complaint in the district court against the United States under the Tucker Act demanding judgment in the amount of $1143.03 as payment [fol. 48] for transportation of a certain shipment of goods in 1950. A substitute answer filed by the

United States admitted liability for the amount demanded under the 1950 shipment, but pleaded payment in full, by a check for $117.77 in 1951 and by credits of $1025.26 on account of overpayments previously made in the settlement by the United States of four bills submitted by the plaintiff for transportation of goods in 1944—said credits being alleged to have been taken pursuant to § 322 of the Transportation Act of 1940 (54 Stat. 955). The answer contained this further allegation:

> "The said overpayments represent for the most part the difference between charges resulting from the use for computation purposes of carload minimum weights based on the size of car furnished and used, and the charges resulting from the use for computation purposes of carload minimum weights based on the size of car ordered by defendant and adequate for the shipment. Plaintiff at no time prior to, or subsequent to, the time of the filing of this suit furnished the defendant with facts with respect to its failure to provide defendant with the car ordered."

To this pleading the plaintiff filed an "answer" or reply, admitting the receipt of the check in the amount of $117.77 but denying that it had overcharged the United States with respect to the four shipments in 1944: "and the plaintiff further says that the defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 was in full force and effect and applicable thereto; and the plaintiff further says that it fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation."

It appears that with respect to the several shipments [fol. 49] of naval property in 1944 the initial carrier had furnished on each occasion a freight car of greater length than that ordered in the bill of lading, and that the plaintiff, as the terminal carrier (*not* the railroad which furnished the cars) had collected from the government at the higher rates applicable to the size of car furnished rather than at the lower rates applicable to the smaller freight cars ordered.

There had been a long-standing unwritten rule that a carrier held itself out as being able to furnish the cars listed in its tariff, and so could not charge more when it furnished cars larger than those ordered. This rule was carried into § 6(a) of Rule 34 of the rules of the ICC:

> "If carrier is *unable* to furnish open car of length ordered, and furnishes longer car, minimum weight shall be that fixed for car *furnished, except* that if articles are of such length as could have been loaded on car of length ordered, minimum weight shall be that fixed for car *ordered*." [Italics added.]

Under the foregoing rule it followed that, even if the carrier had been unable to supply the size of car ordered, it had to charge only for that size (provided, of course, that such a smaller car would have been big enough to carry the articles shipped). And if the railroad *was* able to furnish the car size ordered, but for its own convenience, or by error, it supplied a larger car (which would be an *a fortiori* case), § 6(a) of Rule 34 by its terms might not apply, but the earlier general unwritten rule required the railroad to make only the charge applicable to the smaller size of car ordered. In 1942, as a wartime measure to force shippers to make a fuller loading of cars, and thus to contribute to their more economical use, the ICC issued Service Order No. 68, above referred to, which, *inter alia*, [fol. 50] suspended the provision of § 6(a) of Rule 34 that had limited charges in the case of the substitution of a larger car to the amount chargeable for the smaller size car ordered. Thus, at the time in question here (1944), if the railroad was unable to furnish the size of car ordered, the railroad properly could bill the shipper for the size of car actually supplied. However, it was determined, and we think correctly, in *Atlantic Coast Line R.R. Co.* v. *United States*, 112 F. Supp. 594 (Ct. Cl. 1953), that where the carrier *was* able to furnish a car of the size ordered, but supplied a larger car, the proper billing was at the rate applicable to the car ordered. This was so because Service Order No. 68 purported only to suspend § 6(a) of Rule 34, whose terms referred to the situation of a carrier who was *unable* to furnish what was ordered; in the case of a carrier who

was able, but did not, furnish the size of car ordered, the old case law rule still governed.

Thus it will be seen that for the year now in question the availability to the carrier of certain sizes of cars became the controlling question of fact in determining the validity of the charges on bills of lading in which the shipper had specified the use of a freight car of a certain size.

In the district court the plaintiff addressed a long list of interrogatories to the defendant, some of which were answered and some objected to. At a hearing on the defendant's objections, the district court ruled that the plaintiff need allege nothing beyond the facts of the particular 1950 shipment set forth in the complaint, the bill for which transportation the United States had refused to pay. The court's ruling is indicated by the following two paragraphs dictated by the judge at the conclusion of the hearing:

> "The defendant contends that the plaintiff is not entitled to recover anything unless it shows that the [fol. 51] government has not made overpayments on prior transportation contracts and designated bills which are referred to in defendant's answer.
>
> I rule as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plaintiff. This is a suit upon a particular contract of transportation. Other contracts claimed by way of setoff or otherwise must be set up in the defendant's answer and proved by the defendant."

Thereafter, the Railroad filed a motion for summary judgment, with an affidavit attached to the motion indicating that through administrative negotiations it had accepted in part the credits asserted by the General Accounting Office, reducing its demand for judgment to the sum of $402.84. The United States moved for judgment in its favor on the ground that the Railroad had "failed to plead facts entitling it to recover herein." On November

23, 1955, the district court gave judgment for the Railroad in the amount of its reduced demand, at the same time denying defendant's motion for judgment. From this judgment the United States has taken the present appeal.

It seems to us that unless the Congress has definitely prescribed otherwise, the position of the United States as shipper, so far as the present case is concerned, is no different from that of a private shipper.

If a private shipper or consignee should pay the carrier before satisfying himself of the correctness of the charges demanded—as he may be required to do pursuant to § 3(2) of the Interstate Commerce Act and regulations of the Commission thereunder—and later sues for a refund of [fol. 52] alleged overpayments, or seeks to set off the amount of the overpayments against another claim admittedly due, in either case the shipper or consignee would have the burden of alleging and proving the fact and the amount of such overpayment.

On the other hand, if the private shipper or consignee should hold up payment of a shipping charge pending an audit to determine its correctness, and is thereupon sued by the carrier for the amount of the charge, of course the carrier would have the burden of alleging and proving the amount due.

Prior to 1940, the government, as shipper, followed the second of the foregoing courses. Payment by the government of transportation bills was accomplished in the same manner as for all other contracts. That is, an officer of the department concerned had to certify to a disbursing officer of his department that the bill was valid in all respects (service rendered, charges at lawful rate, computations correct, expenditure authorized by law, etc.), whereupon it would be paid. A bill that was doubtful in the eyes of the certifying officer would be forwarded to the General Accounting Office for its determination in advance of payment. See 33 Ops. Atty. Gen. 383 (1922). As a practical matter, it may be that the carriers were thus required to extend credit to the United States on account of shipping charges, though it seems that, under § 3(2) of the Act, the carriers were not required by law to relinquish possession of the shipment at destination prior to payment.

In § 322 of the omnibus Transportation Act of 1940 (54 Stat. 955), the Congress enacted as follows:

> "Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier . . . shall be made upon presentation of bills therefor, prior to [fol. 53] audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

The legislative history of § 322 furnishes no further light upon what the Congress may have had in mind with respect to the question before us, except that the inference is pretty clear that the section was remedial legislation passed at the behest of the carriers, who had complained of the inordinate delays of the pre-audit procedure theretofore prevailing which resulted in tying up large amounts of accounts receivable. See Hearings Before the House Interstate and Foreign Commerce Committee on H.R. 10620, 75th Cong., 3d Sess. 35 (1938).

The United States urges us to read the last clause of § 322 as providing in effect that when an accounting officer, upon post-audit of a transportation charge, determines that a certain portion of the amount paid was an overcharge, he may direct the amount of such alleged overcharge to be set off against an amount subsequently found to be due to the carrier on another transaction; and that, when this is done, in order to recover the amount admittedly due on the subsequent transaction, the carrier must have the burden of alleging and establishing that there was no overpayment in the prior transactions used by the government by way of setoff.

We find no language in § 322 justifying this extraordinary result. All that § 322 does is to authorize and direct disbursing officers of the United States to pay transportation bills upon presentation, without waiting for audit or settlement by the General Accounting Office. This the United States might choose to do, just as a private shipper might pay the bills rendered by a carrier without making an audit.

[fol. 54] Section 322 concludes with the words, "but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." We suppose that this provision was inserted out of an abundance of caution, because the availability of a setoff by the United States need not depend upon specific statutory authorization. "It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot* v. *United States*, 15 Pet. 336, 370 (1841). See *Wisconsin Central R.R. Co.* v. *United States*, 164 U.S. 190, 206-10 (1896). The quoted language of § 322 reserves the right to the United States to offset "the amount of any overpayment." This means that, before the claimed setoff must be accepted in a judicial proceeding, the existence of such overpayment must be objectively determined, in fact and in law; it is not enough merely that some accounting officer has unilaterally asserted the existence of such overpayment. In the case at bar, the General Accounting Office has not even determined that there had been such overpayments; it claimed a "credit" for the difference between the amounts properly chargeable for the use of the freight cars actually supplied by the initial carrier and the amounts properly chargeable for the freight cars of the sizes requested in the bills of lading. But as we have seen above, the difference between these two amounts was not necessarily an overcharge in 1944. Whether it was an overcharge or not depended upon the establishment of an extrinsic fact, namely, at the time and place, was the initial carrier able to supply freight cars of the smaller sizes ordered? But in answer to one of plaintiff's interrogatories, the defendant stated that it was "without knowledge of whether a car of the size in feet ordered by defendant was available [fol. 55] to plaintiff and/or the initial carrier." In other words, the government's so-called post-audit did not undertake to determine the important extrinsic fact necessary to be established in order to sustain the claimed setoff.

In summary, we are in agreement with the very recent

statement of the Court of Claims, in *Atlantic Coast Line R.R. Co. v. United States*, 140 F. Supp. 569, 572 (1956), that, "Since the Government is seeking to set off, against an admittedly valid claim, a claim which it asserts arises out of another transaction, it has the burden of persuading us as to the validity of its offset."

Though there is nothing in the terms of § 322 that lends support to the government's position, it would be well, perhaps, to mention another possibility, which has no relation to § 322. It might be that, though the United States has the ultimate burden of proof to establish overcharges in the 1944 transactions which it used as a setoff or "credit" in the present case, yet proof by the United States that the carrier had furnished and charged for cars of larger size than ordered by the bills of lading could be regarded as making out a prima facie case to establish the validity of the claimed credits, entitling the United States to the benefit of a rebuttable presumption that the carrier had available, and could have supplied, cars of the lesser size ordered, and thus was guilty of overcharges. If this were so, then the burden would have been upon the carrier to go forward with evidence tending to rebut the presumption, failing which the validity of the setoff or credit would have been established.

Of course, rules as to burden of proof, rebuttable presumptions, burden of going forward with the evidence, etc., are established as matters of fairness, and convenience or availability of proof.

In the present case, if the statistical chances pointed [fol. 56] strongly to the likelihood that carriers, merely for their own convenience, frequently substituted larger cars for the smaller sizes ordered, it might be reasonable to have a rebuttable presumption to that effect. We gather from *Atlantic Coast Line R.R. Co. v. United States*, 140 F. Supp. 569, 572 (Ct. Cl. 1956), that this factual assumption was probably not so; that is, that it seemed to have been the practice of the carriers to furnish cars of the type ordered if such cars were reasonably available; but the record now before us throws no light upon the point one way or the other.

Again, if evidence as to the availability, at the time and place of shipment, of cars of the size ordered was pecu-

liarly within the knowledge of the carrier, it might be fair to impose upon the carrier the burden of coming forward with such evidence. That does not seem to be so in the case of the present appellee-plaintiff, which was the terminal carrier, not the initiating carrier. Also, in the circumstances of the present case, it is not clear to us that it would have been fair, even if the plaintiff had been the initiating carrier, to put upon such carrier this burden of going forward with the evidence on the point. We say this, because, due to the painfully slow pace of the post-audit by the General Accounting Office, it was not until 1950 that the government claimed a credit or off-set on account of alleged overcharges in 1944—and such records as the carrier was required to keep, assuming they would have established whether smaller cars were available, were not required to be kept more than three years. See *Atlantic Coast Line R.R. Co.* v. *United States*, 140 F. Supp. 569, 572 (Ct. Cl. 1956).

On the whole, we do not think that the record before us contains sufficient information to enable us intelligently to prescribe a judicially made rule as to a rebuttable pre- [fol. 57] sumption. Besides, the relevant factors are so complex and debatable that we probably ought not, in any event, to apply a rule of rebuttable presumption, absent a prescription by the Congress on the subject.

The judgment of the District Court is affirmed.

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—August 10, 1956

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD, *Clerk.*
By: /s/ DANA H. GALLUP
Chief Deputy Clerk.

NOTE RE MANDATE

Thereafter, on August 28, 1956, mandate issued and the original papers were returned to the District Court.

CLERK'S CERTIFICATE OMITTED ON PRINTING

* * * * *

[fol. 59] SUPREME COURT OF THE UNITED STATES

[title Omitted]

* * * * *

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November fifteenth, 1956.

FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States.

Dated this fifth
day of November, 1956.

[fol. 60] SUPREME COURT OF THE UNITED STATES

[Title Omitted]

* * * * *

ORDER ALLOWING CERTIORARI. Filed January 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and case transferred to the summary Calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. —— 45

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
RALPH S. SPRITZER,
Assistant to the Solicitor General,
MELVIN RICHTER,
MORTON HOLLANDER,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on August 10, 1956.

OPINIONS BELOW

The oral opinion of the United States District Court for the District of Massachusetts (R. 39)[1] is not reported. The opinion of the court of appeals (App. A, p. 15) is reported at 236 F. 2d 101.

[1] All "R." or record references are to the pages of "Appellant's Record Appendix" printed for the use of the court below and filed here pursuant to Rule 21 of this Court.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1956 (App. A, p. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). By order of Mr. Justice Frankfurter, dated November 5, 1956, the time for filing a petition for a writ of certiorari was extended to November 15, 1956.

QUESTIONS PRESENTED

The United States, in shipping naval property by rail in 1944, ordered freight cars of a certain size. Cars larger than those ordered were furnished and proportionately higher charges were imposed. Pursuant to Section 322 of the Transportation Act of 1940, the Government promptly paid the bills presented. On post-audit, the Government questioned the higher charges—which, concededly, can only be justified if no cars of the type ordered were in fact available to the carrier—and it offset the difference (in conformity with Section 322) against a later transportation bill submitted by the carrier for other services. The carrier thereupon brought suit on the later transportation bill, claiming that it was entitled to the full amount of that bill undiminished by the Government's deduction. The following questions are presented:

1. Whether, as the Government contends, the carrier had the burden of proving that its charges for the original services were correct or whether, as the courts below held, Section 322 shifts to the United States the burden of proving that they were excessive.

2. Whether, even assuming that under Section 322 the Government has the burden of establishing the incorrectness of a carrier's charges, such burden extends to facts (such as unavailability of cars of the type ordered) peculiarly within the knowledge of carriers or accessible to them.

STATUTE INVOLVED

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U. S. C. 66, provides as follows:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

STATEMENT

This action was brought against the United States by respondent New York, New Haven and Hartford Railroad Company under the Tucker Act, 24 Stat. 505, as amended, 28 U. S. C. 1346 (a) (2), to recover sums due it for transporting Government property (R. 3–4). The pertinent facts are undisputed and may be summarized as follows:

During September and October, 1944, the Government shipped several carloads of naval supplies to

Massachusetts and Rhode Island (R. 8, 9, 11, 13, 15, 18, 21–22, 24, 25, 27, 28, 30, 32). Each shipment was made under a Government bill of lading which called for an open freight car of specified length (R. 24, 26, 28, 30, 31). The following month, respondent, the terminal carrier, presented bills to the Government for these transportation services (R. 10, 13, 16, 18, 22, 25, 27, 29, 30, 32).[2] Pursuant to Section 322 of the Transportation Act of 1940, *supra*, page 3, the bills were paid promptly upon presentation, without prior audit by the General Accounting Office (R. 10, 13, 16, 18, 22, 25, 27, 29, 30, 32; App. A, p. 16).

Thereafter, the bills were post-audited by the General Accounting Office (R. 25, 27, 29, 30–31, 32). The audit revealed (1) that in each instance the initial carrier had furnished a freight car larger than that ordered by the Government in the bill of lading, and (2) that the charges in the bills had been computed upon the basis of the minimum weight fixed for cars of the size *furnished*, rather than the minimum weight fixed for cars of the size *ordered* (R. 24–25, 26, 28, 30, 31–32). In view of the complete absence of any showing that the initial carriers were not able to furnish cars of the size ordered, and in view of the further fact that "such information is peculiarly within the knowledge of plaintiff [respondent] and/or the initial carrier," the General Accounting Office, in 1950, claimed a refund for the difference between the charges for the cars ordered and those furnished (R.

[2] The terminal carrier, as provided in the Standard Government Bill of Lading used in the shipments in question, acts as agent for all participating carriers in collecting shipping charges.

24–25, 27, 28, 29, 30–31, 32). Respondent was promptly so advised on Standard G. A. O. Form No. 1003 (R. 25, 27, 29, 31, 32). This form states that unless the overpayment is refunded within sixty days, it will be deducted pursuant to Section 322 from any other amount "subsequently found to be due such carrier" (*supra*, p. 3).

Respondent ignored the refund demands. Deduction was accordingly made from a bill submitted by respondent in June, 1951 (for certain 1950 transportation), and paid (after deduction) the following month (R. 26, 28, 29, 31, 33).

Respondent filed this action in the district court on May 14, 1953, alleging (1) the performance of the later (1950) transportation service; (2) the billing of the Government for that service in the amount of $1,143.03, representing the lawful charges under applicable tariffs; and (3) the Government's refusal to pay the bill as rendered (R. 3–4). The complaint alleged no facts relating to the 1944 shipments upon which the Government predicated its deduction. The relief sought was the recovery of the entire amount of the bill for the 1950 transportation (R. 4).

In a substitute answer, the Government admitted the performance of the 1950 transportation service and the correctness of respondent's charges for that service (R. 5). It asserted, however, that respondent had been paid in full, $117.77 having been paid to it by check and the balance having been credited against the overpayments on the 1944 bills (R. 5). The answer explained the basis of the determination of overpayment and alleged that respondent at no

time furnished the Government with facts respecting its failure to furnish cars of the size ordered (R. 6).

Respondent filed a response described as "Plaintiff's Answer to Defendant's Counterclaim" (R. 6). This response admitted receipt of the $117.77 check but denied that the Government was overcharged on the 1944 shipments. The issue was thus narrowed to the correctness of the original charges demanded by the carrier and paid by the Government in 1944.

Thereafter, the district court ruled that the burden of establishing the essential facts relating to the 1944 transportation service, *i. e.*, that the carriers could not have furnished cars of the type that the Government ordered, rested on the United States (R. 39). On the basis of this ruling, the court, on November 23, 1955, entered summary judgment for respondent in the amount of $402.84 (R. 43–44).[3]

The court of appeals affirmed. The opinion points out that, prior to the enactment of Section 322 in 1940, the Government did not pay transportation bills until it determined, on the basis of a detailed pre-audit by the General Accounting Office, that the charges were correct (App. A, p. 19). Under that practice, if the charges were found to be excessive and a lesser amount was paid by the Government, the carrier in bringing a suit for the difference "of course * * * would have the burden" of proving the underpayment (App. A, p. 19). The opinion also observes that Section 322 was enacted as "remedial legislation passed at the behest of the carriers, who

[3] This figure was reached following an agreement between the parties allowing the Government a credit of $622.42 (R. 39–41).

had complained of the inordinate delays of the pre-audit procedure theretofore prevailing which resulted in tying up large amounts of accounts receivable" (App. A, p. 20). The court concluded, however, that prompt, unaudited payment by the Government, pursuant to Section 322, permanently frees the carrier of the burden of justifying its charges and that an administrative offset, made after audit and effectuated in conformity with the statute, is insufficient to put the carrier to its proof (App. A, p. 24).

REASONS FOR GRANTING THE WRIT

The decision below treats Section 322 (*supra*, p. 3) as effecting a basic change in the rights of the United States, as shipper, *vis-à-vis* common carriers. As interpreted, the section does not merely give the carrier the advantage (which Congress plainly intended to confer) of prompt payment, *i. e.*, freedom from the delays which are the necessary incident of a Government pre-audit; it accomplishes the further result that, if post-audit reveals the probability that an overpayment has been made, the carrier can no longer be put to its proof that its original charges were correct. The latter result, we shall urge, sharply departs from the legislative purpose.

The question whether the post-audit procedures contemplated by Section 322 strip the Government of the protection which it theretofore enjoyed under its pre-audit practice is one of manifest practical importance. Available figures received from the General Accounting Office show that the Government audited more than seventeen million freight and passenger bills

during the past eight years.[4] Questions as to the correctness of transportation charges are very substantial in number.[5] And we find that in various types of cases, as in the class of cases of which the instant suit is typical, the matter of burden of proof is not merely important but apt to be crucial.

Even assuming that Section 322 imposes a new burden on the Government—the duty, in ordinary circumstances, of disproving the correctness of the carrier's transportation charges—the decision below cannot be justified, we submit, for the burden of proof has here been extended, in conflict with settled principle, to the point where the Government has been required to offer the proof on a subject (availability of cars of the type ordered) as to which the adverse party, and not the Government, is chargeable with knowledge.

1. Section 322 assures to the carrier payment on presentation "prior to audit or settlement by the General Accounting Office." It further provides, however, that "the right is reserved to the United States Government to deduct the amount of any overpayments to any such carrier from any amount subsequently found to be due such carrier." The right thus explicitly reserved is scarcely meaningful if the

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[4] See Appendix B, *infra*, p. 25, reproducing a letter from the Comptroller General to the Solicitor General, dated October 17, 1956, previously filed with this Court following the oral argument in *United States* v. *Western Pacific Railroad*, No. 18, this Term.

[5] Note that more than one million notices of overpayment, involving more than three hundred million dollars, were issued between 1948 and 1956. Appendix B, *infra*, p. 26.

making of the deduction fails to put the carrier to its proof that the original charges were correct. The apparent function of the reservation was to confirm the Government's right, if post-audit gave reason to believe that there had been an overcharge, to put itself in the very same position that it would have occupied had it discovered the error by a pre-audit. The new practice—post-audit rather than pre-audit—was designed to give the carrier the benefit of immediate payment, but without prejudice to the Government's right to put itself *in statu quo ante* in respect of those matters as to which subsequent audit showed error or probability of error.

Where the protection of the public treasury is involved, both Congress and the courts have been solicitous of the traditional right of the United States to require a full showing by the claimant. *Grand Trunk Western Railway Co.* v. *United States*, 252 U. S. 112, is strikingly analagous to the case at bar. There, the Postmaster General had concluded that for a period of twelve years the Government, as a result of a continuing mistake of fact, had overpaid Grand Trunk Western for the carriage of mail. The Postmaster General thereupon deducted from a current bill the amount of all prior overpayments. The carrier brought suit under the Tucker Act (as did the carrier here) challenging the deduction. In speaking for a unanimous Court, Justice Brandeis rejected the contention that the validity of the deduction should have been established by the Government before it was made, holding that the United States "was under no

obligation to establish the illegality [of the prior overpayments] by suit." 252 U. S. at 121. It is difficult to see why a different result should apply here—a situation in which Congress has authorized, in most explicit language, an administrative offset.

The strong policy that a claimant suing the United States must affirmatively establish the underlying facts is reflected in Rule 55 (e) of the Federal Rules of Civil Procedure. Under that Rule, a default judgment cannot be entered against the United States; the claimant must first establish "his claim or right to relief by evidence satisfactory to the court." This requirement, it is important to note, was originally imposed by Section 6 of the Tucker Act (Act of March 3, 1887, 24 Stat. 505, 506),* under which the instant suit was filed.

An examination of its legislative history shows that Section 322 was passed at the instance of common carriers to give them the benefit of prompt payment. In that history, there is not the slightest suggestion or intimation that the Government's rights would be altered by the use of a post-audit, rather than a pre-audit, procedure. It appears, on the contrary, that all concerned were of the view that the Government's position would be fully preserved in every respect by the reservation of the right to deduct from subsequent

* When the requirement was incorporated into the Rules, it was dropped from the Judicial Code. See Notes of Advisory Committee on Rules of Civil Procedure, S. Doc. No. 101, 76th Cong., 1st Sess., p. 271; H. Rept. No. 308, 80th Cong., 1st Sess., p. A 239.

bills any overpayment revealed by post-audit.[9a] The only inference which that history admits is that the carriers were to receive the benefit of immediate payments, but that the Government was to retain unimpaired the right to put the carriers to their proof whenever a post-audit revealed to the Comptroller General that there was a basis for doing so. We are appending (Appendix C, *infra*, pp. 27–32) a discussion which traces the various bills leading up to the enactment of Section 322 and undertakes to summarize the pertinent legislative history.

2. Even if the Government, contrary to the views expressed above, had an initial burden, its burden must be deemed satisfied by a showing that the carrier delivered cars of a type other than that which was ordered. The ruling below—that the Government was required to disprove the carrier's assertion that cars of the type ordered were unavailable—imposed on the shipper the burden of establishing facts peculiarly within the knowledge of the adverse party. The consistent holdings of this Court demonstrate that such a burden may not be imposed. *Selma, Rome &c. Railroad* v. *United States*, 139 U. S. 560, 566; *United States* v. *Denver & R. G. R. R.*, 191 U. S. 84, 91–92; *Commercial Corp.* v. *New York Barge Corp.*, 314 U. S. 104; *Federal Trade Commission* v. *Morton*

[9a] Thus, the carriers themselves, in seeking executive support for a change to a post-audit procedure, stated (see Appendix C, *infra*, p. 28): "In the event that this audit reveals an overpayment, then claim be presented to the carrier for the amount thereof which will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit."

Salt, 334 U. S. 37, 44–45; *SEC* v. *Ralston*, 346 U. S. 119, 126.[7]

It is apparent from the very nature of the fact in issue here that the carrier, rather than the United States, must be assumed to know, or have access to, the pertinent information. *Atlantic Coastline R. R.* v. *United States*, 140 F. Supp. 569 (C. Cls.).[8] The record here (which was made on motions for summary judgment) precludes any other assumption. Uncontroverted statements show that the larger cars were "furnished for reasons peculiarly within the knowledge" of the respondent "and/or the initial carrier" and that the United States was "without knowledge of the reasons for the failure to furnish the [cars] ordered" (R. 24–25, 27, 28, 29, 30–31, 32). Similarly, the uncontroverted statements in the record show that the United States "is without knowledge of whether [cars] of the size * * * ordered * * * [were]

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[7] In the *Denver & R. G. R. R.* case, this Court emphasized (191 U. S. 91–92):

"The practical injustice of a different rule * * *. It would require the plaintiff not only to establish a negative, that is, that the timber was *not* cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant, it would impose upon the plaintiff a difficult if not an impossible task to require them to show that the timber was not cut for the construction or repair of the railway, though evidence that it was so cut could be readily produced by the defendant. It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greenl. Ev. sec. 79, 'that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' * * *"

[8] In the cited case, the Court of Claims assumed (incorrectly, we believe) that the "Government * * * has the burden of

available to [respondent] and/or the initial carrier. Such information is peculiarly within the knowledge of [respondent] and/or the initial carrier * * *" (R. 24–25, 27, 28, 29, 30–31, 32)."

CONCLUSION

The court of appeals' interpretation of Section 322 of the Transportation Act of 1940, holding that the Government has the burden of proving the basis of an administrative offset made under that section, is erroneous and has substantial practical importance. The further holding that the Government's burden encompasses matters which are peculiarly within the

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persuading us as to the validity of its offset." 140 F. Supp. 569, 572. However, the Court of Claims went on to recognize that "*as a practical matter, the evidence as to the availability of cars of the sizes ordered would be in the hands of the plaintiff railroad, and hence it was expected to give us all the information it had.*" 140 F. Supp. 569, 572. [Emphasis added.]

" In the face of the record, the court below had no warrant for assuming that respondent had no peculiar knowledge of non-availability of the cars ordered (App. A, p. 24). Moreover, the court's suggestion that the initial carrier, rather than respondent, had peculiar knowledge overlooks the fact that respondent, as the terminal and charge-collecting carrier, acts as agent for all of the connecting carriers and is therefore responsible for the production of records within possession of any of the carriers which have a bearing on the correctness of the charges collected. See note 2, p. 4.

Nor is it a relevant consideration that there may be an interval of several years between initial payment of the carrier's bill and completion of the General Accounting post-audit. Under the pre-1940 practice, an equivalent period elapsed during the pre-audit, *i. e.*, between presentation and payment of a transportation bill. This certainly did not lessen the carrier's obligation to prove the correctness of a bill challenged by the pre-audit. And if the present post-audit practice means that the

ambit of the carrier's knowledge and responsibility conflicts with settled principles. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

MELVIN RICHTER,
MORTON HOLLANDER,
Attorneys.

NOVEMBER 1956.

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carrier must retain for a longer time those records which will be necessary to justify its charges in the event that some question arises in relation thereto, any resulting disadvantage is far outweighed by the advantage accruing to it from the prompt receipt of payment following presentation and the use by the carrier of public funds to the extent that the bills include overcharges.

APPENDIX A

1. Opinion of the Court of Appeals

August 10, 1956

Magruder, *Chief Judge*. This is an appeal from a summary judgment in favor of the New York, New Haven and Hartford Railroad Company against the United States in the sum of $402.84. Though the amount involved is small, this is a test case, determination of which will settle the government's liability in a number of similar suits.

In 1953 plaintiff Railroad filed its complaint in the district court against the United States under the Tucker Act, 28 U. S. C. A. § 1346, demanding judgment in the amount of $1,143.03 as payment for transportation of a certain shipment of goods in 1950. A substitute answer filed by the United States admitted liability for the amount demanded under the 1950 shipment, but pleaded payment in full, by a check for $117.77 in 1951 and by credits of $1,025.26 on account of overpayments previously made in the settlement by the United States of four bills submitted by the plaintiff for transportation of goods in 1944—said credits being alleged to have been taken pursuant to § 322 of the Transportation Act of 1940 (54 Stat. 955). The answer contained this further allegation:

> The said overpayments represent for the most part the difference between charges resulting from the use for computation purposes of carload minimum weights based on the size of car furnished and used, and the charges resulting

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> from the use for computation purposes of carload minimum weights based on the size of car ordered by defendant and adequate for the shipment. Plaintiff at no time prior to, or subsequent to, the time of the filing of this suit furnished the defendant with facts with respect to its failure to provide defendant with the car ordered.

To this pleading the plaintiff filed an "answer" or reply, admitting the receipt of the check in the amount of $117.77 but denying that it had overcharged the United States with respect to the four shipments in 1944; "and the plaintiff further says that the defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 was in full force and effect and applicable thereto; and the plaintiff further says that it fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation."

It appears that with respect to the several shipments of naval property in 1944 the initial carriers had furnished on each occasion a freight car of greater length than that ordered in the bill of lading, and that the plaintiff, as the terminal carrier (*not* the railroad which furnished the cars) had collected from the government at the higher rates applicable to the size of car furnished rather than at the lower rates applicable to the smaller freight cars ordered.

There had been a long-standing unwritten rule that a carrier held itself out as being able to furnish the cars listed in its tariff, and so could not charge more when it furnished cars larger than those ordered. This rule was carried into § 6 (a) of Rule 34 of the rules of the ICC:

> If carrier is *unable* to furnish open car of length ordered, and furnishes longer car, mini-

> mum weight shall be that fixed for car *furnished, except* that if articles are of such length as could have been loaded on car of length ordered, minimum weight shall be that fixed for car *ordered*. [Italics added.]

Under the foreging rule it followed that, even if the carrier had been unable to supply the size of car ordered, it had to charge only for that size (provided, of course, that such a smaller car would have been big enough to carry the articles shipped). And if the railroad *was* able to furnish the car size ordered, but for its own convenience, or by error, it supplied a larger car (which would be an *a fortiori* case), § 6 (a) of Rule 34 by its terms might not apply, but the earlier general unwritten rule required the railroad to make only the charge applicable to the smaller size of the car ordered. In 1942, as a wartime measure to force shippers to make a fuller loading of cars, and thus to contribute to their more economical use, the ICC issued Service Order No. 68, above referred to, which, *inter alia*, suspended the provision of § 6 (a) of Rule 34 that had limited charges in the case of the substitution of a larger car to the amount chargeable for the smaller size car ordered. Thus, at the time in question here (1944), if the railroad was unable to furnish the size of car ordered, the railroad properly could bill the shipper for the size of car actually supplied. However, it was determined and we think correctly, in *Atlantic Coast Line R. Co. v. United States*, 112 F. Supp. 594, 125 Ct. Cl. 235, that where the carrier *was* able to furnish a car of the size ordered, but supplied a larger car, the proper billing was at the rate applicable to the car ordered. This was so because Service Order No. 68 purported only to suspend § 6 (a) of Rule 34, whose terms referred to the situation of a carrier who was *unable* to furnish what was ordered;

in the case of a carrier who was able, but did not, furnish the size of car ordered, the old case law rule still governed.

Thus it will be seen that for the year now in question the availability to the carrier of certain sizes of cars became the controlling question of fact in determining the validity of the charges on bills of lading in which the shipper had specified the use of a freight car of a certain size.

In the district court the plaintiff addressed a long list of interrogatories to the defendant, some of which were answered and some objected to. At a hearing on the defendant's objections, the district court ruled that the plaintiff need allege nothing beyond the facts of the particular 1950 shipment set forth in the complaint, the bill for which transportation the United States had refused to pay. The court's ruling is indicated by the following two paragraphs dictated by the judge at the conclusion of the hearing:

> The defendant contends that the plaintiff is not entitled to recover anything unless it shows that the government has not made overpayments on prior transportation contracts and designated bills which are referred to in defendant's answer.
>
> I rule as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plaintiff. This is a suit upon a particular contract of transportation. Other contracts claimed by way of setoff or otherwise must be set up in the defendant's answer and proved by the defendant.

Thereafter, the Railroad filed a motion for summary judgment, with an affidavit attached to the motion

indicating that through administrative negotiations it had accepted in part the credits asserted by the General Accounting Office, reducing its demand for judgment to the sum of $402.84. The United States moved for judgment in its favor on the ground that the Railroad had "failed to plead facts entitling it to recover herein." On November 23, 1955, the district court gave judgment for the Railroad in the amount of its reduced demand, at the same time denying defendant's motion for judgment. From this judgment the United States has taken the present appeal.

It seems to us that unless the Congress has definitely prescribed otherwise, the position of the United States as shipper, so far as the present case is concerned, is no different from that of a private shipper.

If a private shipper or consignee should pay the carrier before satisfying himself of the correctness of the charges demanded—as he may be required to do pursuant to § 3 (2) of the Interstate Commerce Act and regulations of the Commission thereunder—and later sues for a refund of alleged overpayments, or seeks to set off the amount of the overpayments against another claim admittedly due, in either case the shipper or consignee would have the burden of alleging and proving the fact and the amount of such overpayment.

On the other hand, if the private shipper or consignee should hold up payment of a shipping charge pending an audit to determine its correctness, and is thereupon sued by the carrier for the amount of the charge, of course the carrier would have the burden of alleging and proving the amount due.

Prior to 1940, the government, as shipper, followed the second of the foregoing courses. Payment by the government of transportation bills was accomplished in the same manner as for all other contracts

That is, an officer of the department concerned had to certify to a disbursing officer of his department that the bill was valid in all respects (service rendered, charges at lawful rate, computations correct, expenditure authorized by law, etc.), whereupon it would be paid. A bill that was doubtful in the eyes of the certifying officer would be forwarded to the General Accounting Office for its determination in advance of payment. See 1922, 33 Ops. Atty. Gen. 383. As a practical matter, it may be that the carriers were thus required to extend credit to the United States on account of shipping charges, though it seems that, under § 3 (2) of the Act, the carriers were not required by law to relinquish possession of the shipment at destination prior to payment.

In § 322 of the omnibus Transportation Act of 1940 (54 Stat. 955), the Congress enacted as follows:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier * * * shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

The legislative history of § 322 furnishes no further light upon what the Congress may have had in mind with respect to the question before us, except that the inference is pretty clear that the section was remedial legislation passed at the behest of the carriers, who had complained of the inordinate delays of the pre-audit procedure theretofore prevailing which resulted in tying up large amounts of accounts receivable. See Hearings Before the House Interstate and Foreign

Commerce Committee on H. R. 10620, 75th Cong., 3d Sess. 35 (1938).

The United States urges us to read the last clause of § 322 as providing in effect that when an accounting officer, upon post-audit of a transportation charge, determines that a certain portion of the amount paid was an overcharge, he may direct the amount of such alleged overcharge to be set off against an amount subsequently found to be due to the carrier on another transaction; and that, when this is done, in order to recover the amount admittedly due on the subsequent transaction, the carrier must have the burden of alleging and establishing that there was no overpayment in the prior transactions used by the government by way of setoff.

We find no language in § 322 justifying this extraordinary result. All that § 322 does is to authorize and direct disbursing officers of the United States to pay transportation bills upon presentation, without waiting for audit or settlement by the General Accounting Office. This the United States might choose to do, just as a private shipper might pay the bills rendered by a carrier without making an audit.

Section 322 concludes with the words, "but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." We suppose that this provision was inserted out of an abundance of caution, because the availability of a setoff by the United States need not depend upon specific statutory authorization. "It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot* v. *United States*, 1841, 15 Pet. 336, 370 * * *. See *Wisconsin Central R. Co.* v.

United States, 1896, 164 U. S. 190, 206–210 * * *. The quoted language of § 322 reserves the right to the United States to offset "the amount of any overpayment." This means that, before the claimed setoff must be accepted in a judicial proceeding, the existence of such overpayment must be objectively determined, in fact and in law; it is not enough merely that some accounting officer has unilaterally asserted the existence of such overpayment. In the case at bar, the General Accounting Office has not even determined that there had been such overpayments; it claimed a "credit" for the difference between the amounts properly chargeable for the use of the freight cars actually supplied by the initial carrier and the amounts properly chargeable for the freight cars of the sizes requested in the bills of lading. But as we have seen above, the difference between these two amounts was not necessarily an overcharge in 1944. Whether it was an overcharge or not depended upon the establishment of an extrinsic fact, namely, at the time and place, was the initial carrier able to supply freight cars of the smaller sizes ordered? But in answer to one of plaintiff's interrogatories, the defendant stated that it was "without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier." In other words, the government's so-called post-audit did not undertake to determine the important extrinsic fact necessary to be established in order to sustain the claimed setoff.

In summary, we are in agreement with the very recent statement of the Court of Claims, in *Atlantic Coast Line R. Co.* v. *United States*, 1956, 140 F. Supp. 569, 572, that, "Since the Government is seeking to set off, against an admittedly valid claim, a claim which it asserts arises out of another trans-

action, it has the burden of persuading us as to the validity of its offset."

Though there is nothing in the terms of § 322 that lends support to the government's position, it would be well, perhaps, to mention another possibility, which has no relation to § 322. It might be that, though the United States has the ultimate burden of proof to establish overcharges in the 1944 transactions which it used as a setoff or "credit" in the present case, yet proof by the United States that the carrier had furnished and charged for cars of larger size than ordered by the bills of lading could be regarded as making out a prima facie case to establish the validity of the claimed credits, entitling the United States to the benefit of a rebuttable presumption that the carrier had available, and could have supplied, cars of the lesser size ordered, and thus was guilty of overcharges. If this were so, then the burden would have been upon the carrier to go forward with evidence tending to rebut the presumption, failing which the validity of the setoff or credit would have been established.

Of course, rules as to burden of proof, rebuttable presumptions, burden of going forward with the evidence, etc., are established as matters of fairness, and convenience or availability of proof.

In the present case, if the statistical chances pointed strongly to the likelihood that carriers, merely for their own convenience, frequently substituted larger cars for the smaller sizes ordered, it might be reasonable to have a rebuttable presumption to that effect. We gather from *Atlantic Coast Line R. Co.* v. *United States*, Ct. Cl. 1956 140 F. Supp. 569, 572, that this factual assumption was probably not so: that is, that it seemed to have been the practice of the carriers to furnish cars of the type ordered if such

cars were reasonably available; but the record now before us throws no light upon the point one way or the other.

Again, if evidence as to the availability, at the time and place of shipment, of cars of the size ordered was peculiarly within the knowledge of the carrier, it might be fair to impose upon the carrier the burden of coming forward with such evidence. That does not seem to be so in the case of the present appellee-plaintiff, which was the terminal carrier, not the initiating carrier. Also, in the circumstances of the present case, it is not clear to us that it would have been fair, even if the plaintiff had been the initiating carrier, to put upon such carrier this burden of going forward with the evidence on the point. We say this, because, due to the painfully slow pace of the post-audit by the General Accounting Office, it was not until 1950 that the government claimed a credit or offset on account of alleged overcharges in 1944—and such records as the carrier was required to keep, assuming they would have established whether smaller cars were available, were not required to be kept more than three years. See *Atlantic Coast Line R. Co.* v. *United States*, Ct. Cl. 1956 140 F. Supp. 569, 572.

On the whole, we do not think that the record before us contains sufficient information to enable us intelligently to prescribe a judicially made rule as to a rebuttable presumption. Besides, the relevant factors are so complex and debatable that we probably ought not, in any event, to apply a rule of rebuttable presumption, absent a prescription by the Congress on the subject.

The judgment of the District Court is affirmed.

2. JUDGMENT OF THE COURT OF APPEALS

August 10, 1956

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD,
Clerk.

By /s/ DANA H. GALLUP,
Chief Deputy Clerk.

APPENDIX B

GENERAL ACCOUNTING OFFICE,
COMPTROLLER GENERAL OF THE UNITED STATES,
Washington 25, October 17, 1956.

B-118570
B-119225
B-120583

Re *United States* v. *Western Pacific Railroad* et al. (No. 18, October Term 1956 Supreme Court).

Honorable J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

DEAR MR. RANKIN: I understand that during the oral argument of the above case on October 15, 1956, the Chief Justice requested information as to (1) the

number of carrier bills postaudited annually by the Transportation Division of the General Accounting Office, and (2) the number of such bills with respect to which the postaudit revealed overpayments to carriers.

We are accordingly submitting the following chart showing the number of bills postaudited annually since April 1948, the total amounts involved in those bills, the number of notices of overpayment issued, and the total amounts stated as having been overpaid.

Date	Freight And Passenger Bills Postaudited		Overpayments Issued By General Accounting Office	
	Number	Amount	Number	Amount
4/48–6/30/48	370,548	$121,730,336	15,299	$1,259,289.17
7/1/48–6/30/49	825,660	263,356,528	50,779	12,844,004.48
7/1/49–6/30/50	745,250	524,167,503	77,774	19,828,337.52
7/1/50–6/30/51	2,435,832	1,295,514,850	132,058	32,899,560.40
7/1/51–6/30/52	3,193,989	1,923,938,300	174,464	44,361,365.17
7/1/52–6/30/53	2,802,744	1,916,460,033	163,995	42,799,104.84
7/1/53–6/30/54	2,563,401	1,878,773,426	180,043	48,636,165.66
7/1/54–6/30/55	2,544,383	1,861,786,721	171,707	51,254,358.73
7/1/55–6/30/56	1,738,976	1,900,266,315	136,535	70,598,497.27
Total	17,220,783	$11,625,994,048	1,102,654	$326,880,874.24

We regret that similar information for the period prior to April 1948 is not available at the present time.

For your convenience we are enclosing 25 copies of this letter.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

Enclosure.

APPENDIX C.

Discussion of Background and History of Section 322 of the Transportation Act of 1940

In the late 1930's, the railroads were in critical financial condition. H. Doc. No. 583, 75th Cong., 3d Sess., pp. 1–2; S. Rept. 433, 76th Cong., 1st Sess., pp. 1–2; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2531, January 24, 1939, p. 17. In part, this condition was attributed by the railroads to the prevailing governmental practice of not paying transportation bills upon presentation, as is required of private shippers. Section 3 (2), Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. 3 (2).[1] The railroads pointed out that payment was deferred by the Government until a pre-audit had been completed by the General Accounting Office, and that this tied up large sums of money.

The dissatisfaction by the railroads with the pre-audit practice was reflected in many industry publications. A 1938 editorial in *The Traffic World*, a leading transportation journal, in referring to the delays incident to the payment of freight bills because of the pre-payment audit procedure, declared:

> We should say that the very least that could be done by an administration that * * * pretends especially to be interested in the welfare of the railroads, would be to pay them what it owes them with some degree of promptness.[2]

---

[1] By its terms, Section 3, (2) is inapplicable to transportation services furnished to governmental units.

[2] *The Traffic World*, June 11, 1938, p. 1353. See also, for further evidence of the industry's continuing concern regarding prepayment audit, the following issues of the same publication: June 4, 1938, p. 1310; January 14, 1939, pp. 62, 94; September 14, 1940, p. 615.

At about the same time, the Association of American Railroads wrote to the Procurement Division of the Department of the Treasury. In its letter,[3] the Association described the delays faced by the carriers in obtaining payment for Government transportation services, showed why these delays were subjects of particular concern, and then recommended:

> We believe that the delay in the payment of transportation charges by the Government to the railroads would be absolutely avoided if the various departments contracting for transportation were instructed to pay the bills as rendered and after payment have these bills referred to the General Accounting Office or such other governmental auditing office as might be desired for audit. *In the event that this audit reveals an overpayment, then claim be presented to the carrier for the amount thereof which will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit.* Attention is further directed to the fact that the railroads would never have, under such a plan, more money than the Government lawfully owed for the reason that the Government is shipping daily and is currently obligated to the railroad companies for transportation charges. This would place the handling of governmental transportation charges on substantially the same basis as applies in connection with commercial transactions.
>
> I am very sure from our previous negotiations with you and others connected with the

[3] Letter of October 5, 1937, from Association of American Railroads to Procurement Division, Treasury Department.

Government with regard to the same subject that there exists no differences as between us as to the necessity of more prompt payment than has heretofore prevailed. I hope that you and your associates may consider the suggestions contained herein as reasonable and practical and that we may rely upon your good offices to bring about some such arrangement. [Emphasis added.]

Shortly after receipt of this letter, S. 3876, 75th Cong., 3d Sess., was introduced in the Senate. In embodying the Railroad Association's recommendation it provided, in Section 2, that:

> * * * Payment for the transportation of any such persons or property shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

On June 1, 1938, R. V. Fletcher, the General Counsel of the Association of American Railroads, testified before the House Committee on Interstate and Foreign Commerce in connection with another transportation bill, H. R. 10620, 75th Cong., 3d Sess. In the course of his testimony, Mr. Fletcher called the Committee's attention to Section 2 of S. 3876 and stated:

> Now, if Congress could be persuaded to pass that section or to incorporate that section in this bill, it would relieve the railroads from a very embarrassing situation growing out of the fact, * * * that the Government always owes the railroads a very considerable amount of money due to the delay in having their bills checked and audited and approved by the General Accounting Office.

> * * *. frequently 10, 15, or 20 million dollars are tied up for a considerable period of time over in the General Accounting Office awaiting a careful preaudit of those bills, while under the law other shippers must pay upon presentation of bills or delivery of the freight within a period of 3 or 4 days.
>
> The Government pays its bills to the railroads only after this careful check and preaudit, which causes a lot of delay in the payment of bills and ties up a great deal of money badly needed by the railroads. If that section could be put in here, it would require the payment of the bills by the Government as they are rendered by the railroads, with the privilege, however, of course, if it should develop that there has been an overpayment, the Government may deduct that amount from subsequent bills.[4]

Neither H. R. 10620 nor S. 3876 was enacted by the 75th Congress. In the 76th Congress, however, several bills were introduced in both Houses incorporating the provisions of Section 2 of S. 3876. Some of these bills, in common with the earlier bills, dealt exclusively with the transportation of Government property.[5] Others were omnibus transportation bills, of which only some provisions related to Government transportation.[6] One of the latter was drafted by,

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[4] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 10620, 75th Cong., 3d Sess., June 1, 1938, pp. 34–35.

[5] See, *e. g.*, S. 1915, 76th Cong., 1st Sess., introduced March 23, 1939 [84 Cong. Rec. 3143]; S. 1990, 76th Cong., 1st Sess., introduced March 30, 1939 [84 Cong. Rec. 3509]. Section 2 of both of these bills dealt with the payment of transportation bills upon presentation.

[6] See *e. g.*, H. R. 2531, 76th Cong., 1st Sess., introduced January 13, 1939 [84 Cong. Rec. 345]; H. R. 4862, 76th Cong., 1st Sess., introduced March 8, 1939 [84 Cong. Rec. 2312]. Section

and introduced at the behest of, representatives from railroad management and labor and was familiarly known as the "railroad bill".[7]

Mr. Fletcher again testified before the House Committee on Interstate and Foreign Commerce on behalf of the American Association of Railroads and urged the passage of the provision in H. R. 2531 pertaining to Government payment upon presentation of charges. See Hearings before House Committee on Interstate and Foreign Commerce on H. R. 2531, 76th Cong., 1st Sess., February 24, 1939, pp. 652–653. And at the same hearing, a representative of the trucking industry called upon the Committee to broaden the provision so as to encompass motor carriers as well, observing that (*id.*, p. 472):

> * * * Some of our carriers have had to wait from 6 months to a year to get their money from the Government. We want to be accorded the same treatment you give the railroads.

Unlike the above bills (none of which was enacted), the bill which eventually became the Transportation Act of 1940 did not, in its original form, contain any provision respecting Government traffic. This bill, S. 2009, 76th Cong., 1st Sess., was introduced March 30, 1939, and reported out by the Senate Committee on Interstate Commerce, six weeks later, without any prompt payment provision, S. Rept. 433, 76th Cong., 1st Sess. However, in the House, the Committee on Interstate and Foreign Commerce added the payment-

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501 of H. R. 2531 and Sections 201 and 202 of H. R. 4862 concerned Government traffic. Their provisions were substantially the same as the provisions in S. 1915 and 1990, n. 5, *supra*, p. 30, H. R. 1862, n. 6, *supra*, p. 30. See Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 4862, 76th Cong., 1st Sess., March 7–30, 1939, p. 1101.

upon-presentment-prior-to-audit provision as Section 322. The Committee's explanation of the addition was simple: "Section 322 provides for prompt payment to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States and includes a provision for deduction of overpayments." H. Rept. 1217, 76th Cong., 1st Sess., p. 28.

The addition survived two subsequent joint conferences (H. Rept. 2016, 76th Cong., 3d Sess.; H. Rept. 2832, 76th Cong., 3d Sess.) and, on September 18, 1940, Section 322 was enacted in its present form, see p. 3, *supra*.

At no place in the hearings, reports, or debates on Section 322 or its counterpart provisions in earlier bills was it suggested that the Section was designed to shift the burden of proof in cases involving carrier claims against the United States from the carrier to the Government. To the contrary, the legislative history discloses a single and abiding congressional purpose: to confer on the carriers the benefit of prompt payment by eliminating the General Accounting Office pre-audit and, at the same time, to protect the Government against damage from overpayment by explicit reservation of the right, after audit, to deduct overpayments from bills later submitted by the carriers.

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No. 45

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 45

UNITED STATES OF AMERICA, PETITIONER

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The oral opinion of the United States District Court for the District of Massachusetts (R. 33-34) is not reported. The opinion of the United States Court of Appeals for the First Circuit (R. 39-47) is reported at 236 F. 2d 101.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1956 (R. 47). By order of Mr. Justice Frankfurter, dated November 5, 1956, the time for filing a petition for a writ of certiorari was extended

to November 15, 1956. (R. 48). The petition was filed on November 13, 1956, and was granted on January 14, 1957 (R. 48). 352 U.S. 965. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States, in shipping naval property by rail in 1944, ordered freight cars of a certain size. Cars larger than those ordered were furnished and proportionately higher charges were imposed. Pursuant to Section 322 of the Transportation Act of 1940, the Government promptly paid the bills presented. On post-audit, the Government questioned the higher charges—which, concededly, can only be justified if no cars of the type ordered were in fact available to the carrier—and it offset the difference (in conformity with Section 322) against a later transportation bill submitted by the carrier for other services. The carrier thereupon brought suit on the later transportation bill, claiming that it was entitled to the full amount of that bill undiminished by the Government's deduction. The following questions are presented:

1. Whether, as the Government contends, the carrier had the burden of proving that its charges for the original services were correct or whether, as the courts below held, Section 322 shifts to the United States the burden of proving that they were excessive.

2. Whether, even assuming that under Section 322 the Government has the burden of establishing the incorrectness of a carrier's charges, such burden extends to facts (such as unavailability of cars of the type ordered) peculiarly within the knowledge of carriers or accessible to them.

STATUTE INVOLVED

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66, provides as follows:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office; but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

STATEMENT

This action was brought against the United States by respondent New York, New Haven and Hartford Railroad Company under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346(a)(2), to recover sums allegedly due it for transporting Government property (R. 3). The pertinent facts are undisputed and may be summarized as follows:

During September and October, 1944, the Government shipped several carloads of naval supplies to Massachusetts and Rhode Island (R. 7, 8, 9, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27). Each shipment was made under a Government bill of lading which called for an open freight car of specified length (R. 21, 22, 23-24, 25, 26). The following month, respondent, the terminal carrier, presented bills to the Government for these transportation services (R. 8,

11, 13, 15-16, 18, 21, 23, 24, 25, 27).[1] Pursuant to Section 322 of the Transportation Act of 1940, *supra*, p. 3, the bills were paid promptly upon presentation, without prior audit by the General Accounting Office (R. 8, 11, 13, 16, 18, 21, 23, 24, 25, 27).

Thereafter, the bills were post-audited by the General Accounting Office (R. 21, 23, 24, 26, 27). The audit revealed (1) that, in each instance, the initial carrier had furnished a freight car larger than that ordered by the Government in the bill of lading, and (2) that the charges in the bills had been computed upon the basis of the minimum weight fixed for cars of the size *furnished*, rather than the minimum weight fixed for cars of the size *ordered* (R. 21, 23, 24, 26, 27). In view of the complete absence of any showing that the initial carriers were not able to furnish cars of the size ordered, and in view of the further fact that "[s]uch information is peculiarly within the knowledge of plaintiff [respondent] and/or the initial carrier," the General Accounting Office, in 1950, claimed a refund for the difference between the charges for the cars ordered and those furnished (R. 21, 22-23, 24, 25-26, 27). Respondent was promptly so advised on standard G.A.O. Form No. 1003 (R. 21-22, 23, 24, 26, 27). This form states that, unless the overpayment is refunded within sixty days, it will be deducted pursuant to Section 322 from any other amount "subsequently found to be due such carrier" (*supra*, p. 3).

Respondent ignored the refund demands. Deduction was accordingly made from a bill submitted by respondent in June 1951 (for certain 1950 transporta-

[1] The terminal carrier, as provided in the Standard Government Bill of Lading used in the shipments in question, acts as agent for all participating carriers in collecting shipping charges.

tion), and paid (after deduction) the following month (R. 22, 23, 25, 26, 27-28).

Respondent filed this action in the District Court on May 14, 1953, alleging (1) the performance of the later (1950) transportation service; (2) the billing of the Government for that service in the amount of $1,143.03, representing the lawful charges under applicable tariffs; and (3) the Government's refusal to pay the bill as rendered (R. 3). The complaint alleged no facts relating to the 1944 shipments upon which the Government predicated its deduction. The relief sought was the recovery of the entire amount of the bill for the 1950 transportation (R. 3).

In a substitute answer, the Government admitted the performance of the 1950 transportation service and the correctness of respondent's charges for that service (R. 4-5). It asserted, however, that respondent had been paid in full, $117.77 having been paid to it by check and the balance having been credited against the overpayments on the 1944 bills (R. 5). The answer explained the basis of the determination of overpayment and alleged that respondent at no time furnished the Government with facts respecting its failure to furnish cars of the size ordered (R. 5).

Respondent filed a response described as "Plaintiff's Answer to Defendant's Counterclaim" (R. 5-6). This response admitted receipt of the $117.77 check but denied that the Government was overcharged on the 1944 shipments. The issue was thus narrowed to the correctness of the original charges demanded by the carrier and paid by the Government in 1944.

Thereafter, the District Court ruled that the burden of establishing the essential facts relating to the 1944 transportation service, *i.e.*, that the carriers could not

have furnished cars of the type that the Government ordered, rested on the United States (R. 33-34). On the basis of this ruling, the court, on November 23, 1955, entered summary judgment for respondent in the amount of $402.84 (R. 37-38).[2]

The Court of Appeals affirmed. The opinion points out that, prior to the enactment of Section 322 in 1940, the Government did not pay transportation bills until it determined, on the basis of a detailed *pre*-audit by the General Accounting Office, that the charges were correct (R. 43). Under that practice, if the charges were found to be excessive and a lesser amount was paid by the Government, the carrier, if it brought suit for the difference, "of course * * * would have the burden" of proving the underpayment (R. 43). The opinion also observes that Section 322 was enacted as "remedial legislation passed at the behest of the carriers, who had complained of the inordinate delays of the pre-audit procedure theretofore prevailing which resulted in tying up large amounts of accounts receivable" (R. 44). The court concluded, however, that prompt, unaudited payment by the Government, pursuant to Section 322, permanently frees the carrier of the burden of justifying its charges and that an administrative offset, made after audit and effectuated in conformity with the statute, is insufficient to put the carrier to its proof (R. 47).

SUMMARY OF ARGUMENT

Section 322 of the Transportation Act of 1940 provides that the Government shall make payment of bills for transportation services on presentation, "prior to

[2] This figure was reached following an agreement between the parties allowing the Government a credit of $622.42 (R. 35).

audit or settlement by the General Accounting Office". It further provides, however, that "the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier". The Court of Appeals has held that the exercise of this explicitly reserved right does not put the carrier to its proof, in subsequent judicial proceedings arising out of the deduction, that the original charges were correct. The court has further held that this is so even where, as here, the correctness or incorrectness of those charges is wholly dependent upon factual information peculiarly within the carrier's possession. It is our position that both of these holdings are erroneous.

I

A. Traditionally, contractual claims against the Government have been paid only after an administrative audit has demonstrated their correctness. Where the evidence furnished to the accounting officials in support of the claim leaves the matter of validity in doubt, the claim is disallowed. If dissatisfied with the disallowance, the claimant's recourse is a suit under the Tucker Act, in which it has the burden of alleging and proving facts which will establish clear liability on the part of the United States for the amount purportedly due it. Prior to 1940, these settled procedures were applicable to common carriers, as well as to all other claimants (who are still subject to them). Thus, had the present dispute involved charges for transportation services performed in 1939, rather than 1944, respondent would have had to establish its entitlement to the full amount of those charges.

B. The background and legislative history of Section 322 show that the Section was passed at the instance of common carriers to give them the benefit of prompt payment. There was not the slightest intimation that the Government's rights would be altered by the use of a post-audit, rather than a pre-audit, procedure. It appears, on the contrary, that all concerned were of the view that the Government's position would be fully preserved in every respect by the reservation of the right to deduct from subsequent bills any overpayment revealed by post-audit. The only inference which the background and history admit is that the carriers were to receive the benefit of immediate payments, but that the Government was to retain unimpaired the right to put the carriers to their proof whenever a post-audit revealed to the Comptroller General that there was a basis for doing so. Indeed, the carriers themselves, in seeking the change to a post-audit procedure, stated that, should the audit reveal an overpayment, the carrier would make a prompt refund; reserving the right to bring suit to recover the refunded amount if it felt that the conclusion reached on the audit was erroneous. Moreover, the conditional nature of a pre-audit payment made under Section 322 was expressly recognized by this Court in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59.

C. In holding that respondent was under no obligation to prove the correctness of its original (1944) charges, the court below relied on the fact that the suit was brought on the later, and concededly correct, bill against which the Government made its offsetting deduction. As the Court of Appeals viewed the matter, by refusing to refund the overpayments as administra-

tively determined[3] and by requiring the Government to make a deduction from a subsequent bill, respondent relieved itself of the duty to justify its disputed 1944 charges and shifted to the Government the burden of establishing, by way of a counterclaim, that those charges were incorrect.

It is true that the carrier's complaint in terms states a claim on the subsequent bill and that it does not undertake to disclose the real controversy which prompted the Government, acting under Section 322, to make a deduction before paying that later bill. But the pleadings as a whole indisputably establish that the only issue between the parties is whether the original 1944 charges were correct. We submit that the statutory scheme is designed to maintain for the federal treasury its traditional protection and that the burden remains on the party claiming against the United States to establish, as against the Comptroller General's contrary determination, the correctness of its charges. This purpose is not to be defeated by an artfully elliptical complaint.

This Court has regularly looked through form to substance in considering suits following upon an administrative deduction from an undisputed claim. It has held that such an action is not to be regarded as one involving the undisputed claim, but is to be deemed, both for jurisdictional and other purposes, as presenting solely the question of the propriety of the deduction. See, *e.g.*, *Reynolds* v. *United States*, 292 U.S. 443, and *Alcoa Steamship Co.* v. *United States*, 338 U.S. 421.

This Court has also recognized that, even in the absence of the special considerations present when the

[3] Carriers have ordinarily refunded prior to instituting suit.

procedures of Section 322 are involved, the long-standing right of the United States to require a full showing by the claimant is not defeated by the fact that the latter had, in the first instance, received full payment on its claim. *Grand Trunk Western Ry. Co.* v. *United States*, 252 U.S. 112. And, at least until this litigation, the lower courts, almost without exception, had likewise placed the burden on the claimant to prove that the deduction was improper or, otherwise stated, that the claim actually in issue was correct.

II

Even if the Government, contrary to the views expressed above, had an initial burden, its burden must be deemed satisfied by a showing that the furnished cars were of a type other than that which was ordered.

A. As the court below determined, and as respondent tacitly concedes, the transportation charges computed on the basis of the unordered and unnecessary cars were proper only if equipment of the type ordered was unavailable.

B. On this record, respondent, rather than the United States, must be assumed to know, or have access to, the pertinent information on the question of the availability of cars of the type ordered. While, as the Court of Appeals noted, respondent was the terminal carrier, in collecting the charges it acted as agent for the initial carrier and is therefore responsible for the production of material records in the latter's possession. Consequently, the holding below conflicts with the consistent rulings of this Court that the burden may not be placed upon a litigant of establishing facts peculiarly within the knowledge of an adverse party. See, *e.g.*, *Selma, Rome etc. Railroad* v. *United States*, 139

U.S. 560, 566; *United States* v. *Denver and R. G. R. Co.*, 191 U.S. 84.

ARGUMENT

The decision below interprets Section 322 of the Transportation Act of 1940 as effecting a fundamental and drastic change in the rights of the United States, as shipper, *vis-a-vis* common carriers. As interpreted, the Section does not merely give a carrier the advantage (which Congress plainly intended to confer) of prompt payment, *i.e.*, freedom from the delays which are the necessary incident of a Government pre-audit; it accomplishes the further result that, if the post-audit contemplated by the Section reveals the probability that an overpayment has been made, the carrier can no longer be put to its proof that its original charges were correct.

It is our basic position, developed in Point I below, that the latter result, with its adverse effect upon the protection of the public treasury against improper claims in connection with transportation services, sharply departs from the legislative purpose and disregards the consistent holdings of this Court as to the conditional character of pre-audit payments. We argue further, in Point II, that even assuming that Section 322 imposes a new burden on the Government—the duty, in ordinary circumstances, of disproving the correctness of the carrier's charges—the ruling below cannot be justified. For, in conflict with settled principles, it requires the Government to assume the burden of proof on an issue (availability of cars of the type ordered) as to which the adverse party, and not the Government, is chargeable with knowledge.

I

Respondent Had the Burden of Proving That Its Charges for the 1944 Transportation Services Were Correct

A. *Traditionally, Claimants Against the Government Have Been Required to Establish the Validity of Their Claims.*

It has long been an established procedure in the settlement of Government accounts to subject to administrative scrutiny—prior to payment—bills submitted for the rendition of services pursuant to contract with the United States. See 33 Op. Atty. Gen. 383; *Longwill v. United States*, 17 C. Cls. 288, 290; *Charles v. United States*, 19 C. Cls. 316, 319; *Ravesies v. United States*, 21 C. Cls. 243; *Oregon-Washington R. & N. Co. v. United States*, 54 C. Cls. 131, 138-139; *Southern Pacific Co. v. United States*, 60 C. Cls. 662, affirmed, 272 U.S. 445. Generally, this scrutiny takes the form of examination of the bill by an accounting officer to ascertain its correctness. Only if the responsible officer certifies the bill for payment is actual disbursement of Government funds made. 33 Op. Atty. Gen. 383; Section 1 of the Act of December 29, 1941, 55 Stat. 875, 31 U.S.C. 82(b).[4]

[4] 31 U.S.C. 82(b) provides that disbursing officers shall disburse monies only upon, and in strict accordance with, vouchers duly certified by the department head or by an officer authorized in writing to certify vouchers. For some of the other statutory provisions upon which the pre-payment examination of claims is based, see R.S. 3620, 31 U.S.C. 492 (duty of disbursing officer to draw monies only as it may be required for payments to be made by him "in pursuance of law"); R.S. 3622, 31 U.S.C. 496 (disbursing officer to render monthly accounts); R.S. 3623, 31 U.S.C. 498 (distinct accounts required); R.S. 3633, 31 U.S.C. 514 (civil liability of disbursing officer upon his failure to account); R.S. 3648, 31 U.S.C. 529 (prohibition against advances of public monies);

As judicially recognized at an early date and as declared in formal rulings by the Comptroller General, it is incumbent upon the claimant to furnish evidence satisfactorily establishing its claim. *Charles* v. *United States*, *supra*; 17 Comp. Gen. 865, 870; 17 Comp. Gen. 831, 834; 18 Comp. Gen. 980; 23 Comp. Gen. 907, 909. When the evidence furnished leaves the accounting officer in doubt as to the validity of the claim—and such doubt is shared by the General Accounting Office on its review—the claim is not paid and the claimant's sole recourse is a suit under the Tucker Act.[5] In such a judicial proceeding, the claimant, of

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Section 1 of the Act of August 23, 1912, 37 Stat. 375, as amended, 31 U.S.C. 82 (examination of all vouchers by administrative heads of divisions and bureaus); Section 2 of the Act of December 29, 1941, 55 Stat. 875, 31 U.S.C. 82(c) (accountability of certifying officers for illegal, improper, or incorrect payments resulting from false, inaccurate or misleading certificates made by him, as well as for any payment prohibited by law or which did not represent a legal obligation under the appropriation or fund involved).

For a detailed discussion of Government fiscal management, see Mansfield, *The Comptroller General* (1939), especially chapters V and VII.

[5] As the Court of Claims stated in the *Charles* case [19 C. Cls. at 319]:

> "When, in the course of the examination of accounts in the Departments, suspicions are aroused or doubts are entertained as to the validity of the demands of claimants, the parties may be sent to this court to prove their cases under the rules and forms of law, upon legal and competent evidence, or their demands may be rejected altogether, leaving the claimants to prosecute them here upon their own voluntary petitions, if they so desire. That is the main protection which the accounting officers can secure for themselves and for the government in the case of claims of doubtful validity in fact or in law, and especially of claims as to which there is a reasonable suspicion of fraud, irregularity, or error."

Since 1926, the executive departments have been under instructions from the Comptroller General to transmit—without payment—doubtful accounts and claims to the General Accounting Office.

course, has the same burden as it had at the administrative level:—it must allege and prove facts establishing clear liability on the part of the United States for the amount assertedly due it. *Southern Pacific Co.* v. *United States*, *supra*, 60 C. Cls. at 671; *Charles* v. *United States*, *supra*, 19 C. Cls. at 319.

Prior to the enactment of the Transportation Act of 1940, these procedures were as fully applicable to common carriers as to other claimants. The carrier was paid only that amount which was shown by the pre-audit to be justified. If dissatisfied with the administrative determination, the claimant was obliged to establish that it was entitled to more "by proof as full and satisfactory as that required for the establishment of any other contract to hold the Government liable." *Southern Pacific Co.* v. *United States*, *supra*. See also 33 Op. Atty. Gen. 383; *Oregon-Washington R. & N. Co.* v. *United States*, *supra*.[6]

Section 1 of G.A.O. General Regulations No. 50, April 21, 1926, 4 C.F.R. 4.1. This regulation was promulgated under the authority given the Comptroller General by Congress to prescribe the procedure for the administrative examination of claims against the United States, and to promulgate rules and regulations necessary in this connection. See Sections 309 and 311(f) of the Budget and Accounting Act, 1921, 42 Stat. 20, 25, 31 U.S.C. 49, 52(f).

[6] As the opinion of the Attorney General cited in the text reveals, on November 25, 1922, the Comptroller General promulgated General Regulations No. 13, 2 Comp. Gen. 832, in which he called for a radical revision of the existing system of paying and auditing disbursing accounts. Instead of payment by disbursing officers following a certification of validity by the accounting officer, departmental action would be limited to a certification that the services had been performed, that they were properly authorized and necessary, and that the amount claimed had not been paid but is payable from a particular, designated appropriation. The bill would then be transmitted to the General Accounting Office for audit and, upon approval, actual payment.

The Attorney General, in his opinion, determined the regulation

B. *Section 322 of the Transportation Act of 1940 Was Not Intended to Shift the Burden of Proof in Cases Involving Carrier Claims Against the United States From the Carrier to the Government.*

1. *The background of Section 322.* During the latter part of the 1930's, problems confronting the transportation industry were a matter of national concern. Many of the railroads, it appeared, were in critical financial condition. See H. Doc. No. 583, 75th Cong., 3rd Sess., pp. 1-2; S. Rept. 433, 76th Cong., 1st Sess., pp. 1-2; Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 2531, January 24, 1939, p. 17. Consequently, on March 15 and 17, 1938, a conference was held at the White House to consider the railroads' difficulties and to determine what action might be taken by the Federal Government to improve existing conditions. At this conference, which was attended by representatives of various interested groups, President Roosevelt designated the Chairman and two Commissioners of the Interstate Commerce Commission as a committee of three to recommend remedial legislation. On March 24, 1938 this committee rendered its report to the President. On April 11, 1938, the President transmitted it to the Congress. H. Doc. No. 583, 75th Cong., 3rd Sess.

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to be invalid. And, in commenting on this fact in a letter to the Chairman of the Senate Committee on Interstate Commerce on April 28, 1939, Attorney General Murphy advised that most of the departments and agencies of the Government still audited their respective transportation accounts. This letter was submitted in connection with S. 1915, 76 Cong., 1st Sess., which, as will be seen below, contained a provision similar to Section 322 of the Transportation Act of 1940. It is included in the Committee's files on that bill. And see, also, *Annual Report of the Acting Comptroller General for the fiscal year ending June 30, 1937*, p. 44.

The single recommendation of the committee of three which pertained specifically to transportation services performed for the Government was a proposal for the elimination of the then prevailing land-grant rates, which the committee felt worked an unjustifiable hardship on the land-grant railroads (many of which were experiencing acute financial distress). H. Doc. No. 583, 75th Cong., 3rd Sess., p. 32.

Another source of dissatisfaction in the railroad industry (though it was not treated in the above report) was the governmental practice of not paying rendered transportation bills upon presentation, as is required of private shippers. Section 3(2) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 3(2).[8] This dissatisfaction manifested itself in several forms. For one thing, critical comments were appearing in industry publications. One of the most extreme examples was an editorial in *The Traffic World*, a leading transportation journal. Referring to the delays incident to the payment of freight bills because of the prepayment audit precedure, the editorial accused the Government of disregarding both sound business practices and "common honesty." It added:

> We should say that the very least that could be done by an administration that proclaims from the housetops its condemnation of bad business practices and pretends especially to be interested in the welfare of the railroads, would be to pay them what it owes them with some degree of promptness.

[7] See 10 U.S.C. 1375; *United States* v. *Union Pacific R. Co.*, 249 U.S. 354, 355; *Southern Ry. Co.* v. *United States*, 322 U.S. 72, 73; *United States* v. *Powell*, 330 U.S. 238, 241.

[8] By its terms, Section 3(2) is inapplicable to transportation services furnished to governmental units.

> Nobody likes to have business dealings with the Government, not only because of delay and annoyance incident to the ridiculous amount of red tape involved, but because it is actually dishonest.[9]

On October 5, 1937, J. J. Pelley, President of the Association of American Railroads,[10] raised the issue with the Procurement Division of the Department of the Treasury. In Mr. Pelley's letter, the full text of which is set forth in Appendix B to this brief (pp. 59-63, *infra*), the Association elaborated upon the delays encountered by the railroads in obtaining payment for transportation services rendered the Government and outlined the reasons why these delays were of particular concern. It then stated (pp. 61-62, *infra*):

> We believe that the delay in the payment of transportation charges by the Government to the railroads would be absolutely avoided if the various departments contracting for transportation were instructed to pay the bills as rendered and after payment have these bills referred to the General Accounting Office or such other governmental

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[9] *The Traffic World*, June 11, 1938, p. 1343. See, also, for further evidence of the industry's continuing concern regarding prepayment audit, the following issues of the same publication: June 4, 1938, p. 1310; January 14, 1939, pp. 62, 94; September 14, 1940, p. 615.

[10] This Association, as its name implies, serves as the official spokesman for the railroad industry in the United States. Formed in 1891, its membership includes, although it is not restricted to, the operators of the Class I railroads. Its various divisions and committees deal with every major phase of the industry. See United States Department of Commerce, *National Associations of the United States* (1949), pp. 246, 252. As will be seen below, the Association actively participates in hearings on proposed legislation affecting the interests of its members.

auditing office as might be desired for audit. *In the event that this audit reveals an overpayment, then claim be presented to the carrier for the amount thereof which will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit.* Attention is further directed to the fact that the railroads would never have, under such a plan, more money than the Government lawfully owed for the reason that the Government is shipping daily and is currently obligated to the railroad companies for transportation charges. This would place the handling of governmental transporfation charges on substantially the same basis as applies in connection with commercial transactions.

I am very sure from our previous negotiations with you and others connected with the Government with regard to the same subject that there exists no differences as between us as to the necessity of more prompt payment than has heretofore prevailed. *I hope that you and your associates may consider the suggestions contained herein as reasonable and practical and that we may rely upon your good offices to bring about some such arrangement.* [Emphasis added.]

This recommendation was transmitted to the General Accounting Office by the Department of the Treasury. On December 13, 1937, the Acting Comptroller General ruled (Decision A-90400) that under existing law he could not authorize the payment of transportation bills without a prior determination with respect to the cor-

rectness of the amounts charged. Such determination, in his view, was necessary in order to relieve administrative and disbursing officers of their statutory liability for any overpayments resulting from the utilization by carriers of erroneous or unauthorized rates. The Acting Comptroller General went on to observe, however, that he did not, and would not in the future, require the audit of bills by the General Accounting Office itself prior to their payment.

2. *Legislative history of Section 322.* Approximately a month after the report of the President's committee of three was transmitted to Congress, bills were introduced in both the Senate and the House of Representatives providing for the elimination of land-grant rates on Government transportation. S. 3876, 75th Cong., 3rd Sess., introduced April 20, 1938 (83 Cong. Rec. 5569); H.R. 10620, 75th Cong., 3rd Sess., introduced May 12, 1938 (83rd Cong. Rec. 6842). Doubtless as a result of the thinking reflected in the Association of American Railroads' letter to the Department of Treasury, S. 3876 further provided (Section 2) that:

> "* * * Payment for the transportation of any such persons or property shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

On June 1, 1938, R. V. Fletcher, then General Counsel of the Association of American Railroads, testified before the House Committee on Interstate and Foreign

Commerce in connection with H.R. 10620. In the course of his testimony, Mr. Fletcher called the Committee's attention to Section 2 of S. 3876, and stated:

> Now, if Congress could be persuaded to pass that section or to incorporate that section in this bill, it would relieve the railroads from a very embarrassing situation growing out of the fact, as will be shown to the committee by a later witness, in detail, that the Government always owes the railroads a very considerable amount of money due to the delay in having their bills checked and audited and approved by the General Accounting Office.
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> * * * frequently 10, 15, or 20 million dollars are tied up for a considerable period of time over in the General Accounting Office awaiting a careful preaudit of those bills, while under the law other shippers must pay upon presentation of bills or delivery of the freight within a period of 3 or 4 days.
>
> The Government pays its bills to the railroads only after this careful check and preaudit, which causes a lot of delay in the payment of bills and ties up a great deal of money badly needed by the railroads. If that section could be put in here, it would require the payment of the bills by the Government as they are rendered by the railroads, with the privilege, however, of course, if it should develop that there has been an overpayment, the Government may deduct that amount from subsequent bills.[11]

[11] Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 10620, 75th Cong., 3rd Sess., June 1, 1938, pp. 34-35.

Neither H.R. 10620 nor S. 3876 was enacted by the 75th Congress. In the early months of the 76th Congress, however, several bills were introduced in both houses incorporating the provisions of Section 2 of S. 3876. Some of these bills, in common with those previously introduced, dealt exclusively with the transportation of Government property.[12] Others were omnibus transportation bills, dealing with many other matters as well.[13] One of the omnibus bills was drafted by, and introduced at the behest of, a committee of six representatives from railroad management and labor and was familiarly known as the "railroad bill".[14]

Mr. Fletcher again testified before the House Committee on Interstate and Foreign Commerce on behalf of the Association of American Railroads, and urged

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[12] See, *e.g.*, S. 1915, 76th Cong., 1st Sess., introduced March 23, 1939 (84 Cong. Rec. 3143); S. 1990, 76th Cong., 1st Sess., introduced March 30, 1939 (84 Cong. Rec. 3509). Section 1 of both of these bills dealt with the elimination of land-grant rates; Section 2 with the payment of transportation bills upon presentation.

[13] See, *e.g.*, H.R. 2531, 76th Cong., 1st Sess., introduced January 13, 1939 (84 Cong. Rec. 345); H.R. 4862, 76th Cong., 1st Sess., introduced March 8, 1939 (84 Cong. Rec. 2512). Section 501 of Title V of H.R. 2531 and Sections 201 and 202 of Title II of H.R. 4862 concerned Government traffic. Their provisions were substantially the same as the provisions in S. 1915 and 1990, note 12, *supra*.

[14] H.R. 4862, n. 13, *supra*. See Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 4862, 76th Cong., 1st Sess., March 7-30, 1939, p. 1101.

This "committee of six" had been appointed by the President on September 20, 1938, to supplement the study of transportation problems which had been previously undertaken by the three members of the Interstate Commerce Commission. See p. 15, *supra*. The committee's report and recommendations as to legislation were presented to the President on December 23, 1938. See Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 2531, 76th Cong., 1st Sess., January 24, 1939, p. 17.

the passage of the provision in H.R. 2531 (an omnibus bill) pertaining to Government payment upon presentation of charges. See Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 2531, 76th Cong., 1st Sess., February 24, 1939, pp. 652-653.[15] At the same hearing, a representative of the trucking industry called upon the Committee to broaden the provision so as to encompass motor carriers as well, observing (*id.* at p. 472):

> Some of our carriers have had to wait from 6 months to a year to get their money from the Government. We want to be accorded the same treatment you gave the railroads.

Unlike the above bills (none of which were enacted), the omnibus transportation bill which eventually became the Transportation Act of 1940 did not, in its original form, contain any provisions respecting Government traffic. This bill (S. 2009, 76th Cong., 1st Sess.) was introduced by Senators Wheeler and Truman on March 30, 1939, and was referred to the Committee on Interstate Commerce. That committee reported it out on May 16, 1939 [S. Rept. 433, 76th Cong., 1st Sess.) following which, on May 29, 1939, it was introduced in the House and referred to the Committee on Interstate and Foreign Commerce. On July 18, 1939, the House Committee reported it, having in-

[15] H.R. 2531, as introduced, called for payment upon presentation of bills for the transportation of "persons or property" for the Government. *Hearings*, p. 17. Mr. Fletcher requested that it be amended so as to apply to the transportation of the mails as well. H.R. 4862 (the bill introduced on behalf of the railroads some two weeks thereafter) reflected this suggested change. See Hearings on H.R. 4862, n. 14 *supra*, p. 21, p. 1879.

serted, in the meanwhile, the payment-upon-presentation provision as Section 322.[16] The Section survived two subsequent joint conferences (H. Rept. 2016, 76th Cong., 3rd Sess.; H. Rept. 2832, 76th Cong., 3rd Sess.) and on September 18, 1940, was enacted in its present form.

In sum, Section 322 was designed to serve the single purpose of enabling common carriers to obtain the prompt payment of their bills. The legislative history of the Section shows that it was inserted in the Act solely by reason of the insistence of industry spokesmen that the delay attendant on pre-payment examination of bills gave rise to economic hardship. There is not the remotest indication that Congress was motivated by any other consideration. Specifically, there is nothing in the hearings, reports, or debates to suggest an intent to shift from the carrier to the Government the burden of proof respecting the correctness of the carrier's claim.[17]

[16] The Committee's explanation of the addition was simple: "Section 322 provides for prompt payment to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States and includes a provision for deduction of overpayments." H. Rept. 1217, 76th Cong., 1st Sess., p. 28.

[17] It is to be noted that at no point during the course of the legislative consideration of Section 322 was it opposed or questioned by representatives of the Government. In his letter of April 28, 1938, to the Chairman of the Senate Committee on Interstate Commerce in connection with S. 1915 (see n. 6, *supra*, p. 15), Attorney General Murphy stated that he had no objection to the enactment of the bill. The Comptroller General was not requested to express his views. See Hearings Before the Procurement and Buildings Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Investigation of Procurement and Buildings, Part 7, 80th Cong., 2nd Sess., June 2, 1948, pp. 1049-1050. We doubt this would have been the case had there been the slightest suggestion that Section 322 would relieve carriers of the burden of proving doubtful claims.

3. *Administrative practice under Section 322.* Following the enactment of the Transportation Act of 1940, the former governmental practice of pre-auditing the bills of common carriers was terminated. As the Acting Director of the Budget advised the President in a letter of June 7, 1941, which was then forwarded to the Congress in connection with proposed appropriations legislation (H. Document 249, 77th Cong., 1st Sess., p. 2):

> [Section 322] is construed as implying that Congress recognized that the delay in prompt payment is caused by the time required to verify transportation rates, freight classifications, and land-grant deductions prior to payment of carrier bills. *It is also believed that Congress had in mind that the audit or settlement by the General Accounting Office of such transportation bills would provide sufficient protection of the Government interests.* [Emphasis added.]

And by the Act of June 1, 1942, 56 Stat. 306, 31 U.S.C. 82(g), Congress expressly exempted disbursing and certifying officers from liability for overpayments made "for transportation furnished on Government bills of lading or transportation requests when said overpayments are due to the use of improper transportation rates, classifications, or the failure to deduct the proper amount under land-grant laws or equalization and other agreements." See, also, Section 2 of the Act of December 29, 1941, c. 641, 55 Stat. 875, 876.

The present procedure calls for post-payment audit of carriers' bills by examiners in the Transportation

Division of the General Accounting Office.[18] Should the examiners conclude that there has been an overpayment, or at least that the relevant material at their disposal leaves serious doubt as to the correctness of the charges, the carrier is promptly so advised on a standard General Accounting Office form and is requested to make refund. The carrier then has the opportunity to demonstrate that the administrative conclusion is erroneous in fact or in law. It, of course, may submit additional information in its possession which supports its claim. In the event that the carrier does not either refund or satisfactorily resolve the doubts, a deduction is made from a subsequent bill as provided by Section 322. See *Annual Report of the Comptroller General for the fiscal year ending June 30, 1943*, pp. 44-47; *Annual Report for the fiscal year ending June 30, 1944*, pp. 46-51.[19]

[18] We are advised by the General Accounting Office that each bill is subjected to two independent audits.

[19] That the post-payment audit of transportation bills by the General Accounting Office is a large-scale operation is seen from the activities of its Transportation Division during the fiscal year ending June 30, 1951. With respect to freight transportation, 633,706 vouchers, covering over two and one-half million bills of lading, were audited. 25,591 notices of overpayment, involving over six million dollars, were submitted to carriers. With respect to passenger transportation, 400,639 vouchers, covering almost three million transportation requests were audited. 11,015 notices of overpayment, involving nearly $700,000 were sent out. *Annual Report of the Comptroller General for the fiscal year ending June 30, 1951*, pp. 31-32.

The Second World War placed even a greater burden upon the General Accounting Office. In the fiscal year ending June 30, 1946, for example, it collected over fifty-seven million dollars from common carriers through the audit of transportation bills. *Annual Report of the Comptroller General for the fiscal year ending June 30, 1946*, p. 22. And cf. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 74, n. 17.

The terms of Section 322 fully conform to the consistent administrative view that the Section contemplates a conditional payment to the carrier, and that where the post-audit discloses, as here, the probability of error, the carrier is obliged to make refund at that point.[20] If the Congressional purpose had been to allow the carrier to retain the full amount of the payment to it unless and until the Government demonstrated to the satisfaction of the carrier or a court that there had been an overcharge, the deduction provision would not have been inserted at all. Stated otherwise, Congress hardly would have conferred express authority upon the General Accounting Office to compel restitution on the sole basis of the administrative determination, if it had not regarded that determination as sufficient justification for putting the carrier to the burden of proving its disputed claim in court.

In its recent decision in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, this Court explicitly recognized the conditional nature of the pre-audit payment made under Section 322. Rejecting an argument by the carriers that the Government, in order to protect itself against the exaction of an unreasonable rate, must file an affirmative claim for reparations with the

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[20] The construction given to Section 322 by the General Accounting Office, the legislative agency charged with its administration and with the supervision of Government fiscal matters generally (see pp. 12-14, *supra*), is entitled to great weight. *United States* v. *Bergh*, 352 U.S. 40, 46-47; *Inland Waterways Corp.* v. *Young*, 309 U.S. 517; *United States* v. *Jackson*, 280 U.S. 183, 193; *United States* v. *Citizens Loan & Trust Co.*, 316 U.S. 209, 214; *United States* v. *Madigan*, 300 U.S. 500, 506; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549; *Adams* v. *United States*, 319 U.S. 312, 314-315; *Edward's Lessee* v. *Darby*, 12 Wheat. 207, 210.

Interstate Commerce Commission within the two-year period prescribed by Section 16(3) of the Interstate Commerce Act, 49 U.S.C. 16(3), the Court observed (352 U.S. at 74):

> * * * Congress has relieved the Government from filing such anticipatory suits by expressly authorizing the General Accounting Office to deduct overpayment from subsequent bills of the carrier, if, on post-audit, it finds that the United States has been overcharged. *This right was thought to be a necessary measure to protect the Government, since carriers' bills must be paid on presentation and before audit. On respondents' theory the Government could invoke the right only at the peril of losing its defenses in a later suit by the carrier. Evidently this was not the purpose of Congress in authorizing unilateral set-off.* [Emphasis added.]

And with respect to the carriers' reliance, in another connection, upon the payment *ab initio* of the full amount of their bills the Court stated (352 U.S. at 75):

> The fact that the Government paid the carrier's bills as rendered is without significance in light of § 322 of the Transportation Act, *supra*, requiring payment "upon presentation" of such bills and *postponing final settlement until audit.* [Emphasis added.][21]

[21] The private shipper, who is required by Section 3(2) of the Interstate Commerce Act, 49 U.S.C. 3(2), to pay freight charges promptly, cannot set off an overpayment against the charges for other transportation services rendered to it. The coupling of the requirement of pre-audit payments with a specific provision for recoupment of overpayments negates the suggestion of the court below (R. 43-44) that Section 322 was meant to place the Govern-

Properly viewed, in its setting, Section 322 represents the fulfillment of the legitimate interests of both the carriers and the public treasury. The carrier promptly obtains the use of the money which, according to its bill, is due it, and it is thus spared the substantial delay occasioned by the former pre-auditing practice. But any amount received by the carrier which would not have been paid had pre-audit taken place is to be refunded. In short, an administrative determination that overpayment was made obliges the carrier to do precisely what the Association of American Railroads represented would be done:—to refund promptly, reserving the right "to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit." (See p. 18, *supra*). The deduction provision simply provides the Government with a method of insuring that the *status quo ante* is, in fact, restored.

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ment in precisely the same position as that occupied by private shippers. The force of this conclusion is not lessened—but, if anything, is strengthened—by the long settled principle that, even in the absence of a specific statutory authorization, the Government enjoys the right "which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot* v. *United States*, 15 Pet. 336, 370. Indeed, the Government's general power to withhold and apply goes beyond that of an "ordinary creditor", and confers upon the Comptroller General "[the] power * * * to strike a balance between the debts and credits of the government, subject to [judicial] review." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-240; cf. *Mulligan* v. *United States*, 207 F. 2d 897, 898 (C.A. 2); 31 U.S.C. 227; 28 U.S.C. 2501. Had Congress desired to equate the Government and private shippers, it would have specifically rendered this principle inapplicable to transportation matters, instead of inserting an explicit authorization of administrative offset.

C. Respondent's Obligation to Prove the Correctness of Its 1944 Bills Was Not Affected By Its Institution of Suit on the Later Bills From Which the Deduction Authorized by Section 322 Was Made.

Notwithstanding the above considerations, the court below has interpreted Section 322 in a manner which gives carriers a means of avoiding their traditional obligation to prove that their claims against the Government are lawful and proper. The decision also leads to completely anomalous results.

Thus, if it is administratively determined that an overpayment has taken place and the carrier thereupon makes refund—the common practice until now [22]—the carrier has recourse by suit under the Tucker Act to recover the refund. Like any other claimant asserting an unsatisfied contractual claim against the United States, a carrier, in such a suit, is put to its proof. Had respondent refunded, instead of compelling a deduction, its recovery in this action would be conditioned on a demonstration that its 1944 bills were correct.

But if, instead of refunding, the carrier requires the Comptroller General to make a deduction from a subsequent bill, then, under the holding below, the carrier has no such burden. It can then bring suit on the subsequent bill, without reference to the earlier bills which occasioned the deductions. This device, according to the Court of Appeals, makes it necessary for the Government to bring the earlier shipments into issue

[22] We are advised by the General Accounting Office that, during the fiscal year ending June 30, 1956, carriers refunded a total of $40,941,188.78. The amount deducted from subsequent bills during that same period totaled $11,155,837.72. During the preceding fiscal year, the total amount refunded was approximately two and one-half times the amount deducted.

by way of "setoff" or "counterclaim" and to prove affirmatively that the disputed charges, paid without audit, were incorrect.

This line of reasoning led to the conclusion in this case that, simply because it had elected to bring suit on its concededly correct bill for the 1950 shipment, respondent had no need to set forth any facts relating to the 1944 shipments. Throughout the litigation, respondent itself has placed virtually exclusive reliance upon this election on its part.[23]

This theory, with its accompanying frustration of the legislative purpose underlying Section 322 and its damaging effect upon the protection of the public treasury against the payment of improper claims, cannot be justified. Respondent has been paid in full on its concededly correct 1951 bill (for the 1950 transportation) —partly in cash and partly by way of credit against the prior overpayments. Its sole grievance, as the plead-

[23] In its brief in the Court of Appeals, respondent discussed the Government's observations respecting the traditional obligation of the claimant to establish the validity of its claim in these terms (pp. 3-4):

> [Respondent] has no quarrel with that theorem. It certainly neither denies nor disagrees with such a clear legal principle. In this case [respondent] has complied with every facet of that platitude. The "claim" of the carrier is for transportation charges earned in 1950 by virtue of delivery of a carload of household effects to the Government at Newport, Rhode Island. The "validity" of the claim depends upon the contract and the applicable tariffs, both of which the Government admits in paragraphs 2 and 3 of its substitute answer (R. 5). Thus, as a claimant against the Government in this case, [respondent] has "established" the validity of its claim. Having once established its claim against the Government, [respondent] has no further duty to prove entitlement to recovery. Where a plaintiff has established the truth of its allegations and the defendant still thinks it should not pay, it is up to that defendant to do some establishing of its own.

ings establish (*supra*, p. 5), is that it has been paid less than what it considered itself entitled to for the 1944 transportation. Whether that grievance is legitimate provides the only issue to be litigated. The burden of proof on that issue is determined by the statutory scheme. It cannot be made to depend upon whether the complaint (as distinguished from the pleadings as a whole) is artfully elliptical.

It is to be noted that carriers have occasionally chosen to make a partial refund, leaving it to the Government to deduct from future bills the balance of the administratively determined overpayment. See, *e.g.*, *Wabash Railroad Co.* v. *United States*, 130 C. Cls. 645, 647. Acceptance of respondent's position would mean that, had that been done here, respondent would have been bound to prove the correctness of its bill for the 1944 transportation in order to recover the *refunded* sums; to recover the *deducted* amount, however, it would have had to prove simply the validity of a subsequent bill not itself in dispute. It is difficult, indeed, to perceive a rational basis for such a result.[24]

[24] A still further variation is reflected by *United States* v. *Western Pacific R. Co.*, 352 U.S. 59. That case involved the transportation by three carriers of steel bomb cases filled with napalm gel. Each carrier charged the rate applicable to incendiary bombs. Two of the carriers (Bangor and Seaboard) were paid the full amount of their charges but, following a post-audit determination that a lower rate applied, deductions were made from other bills. By the time the third carrier (Western Pacific) submitted its bill, the Government transportation officers involved were aware of the Comptroller General's determination as to the applicable rate and, accordingly, made payment on the basis of that rate. As the present respondent views the matter, in the ensuing litigation Western Pacific was obligated to prove the applicability of the charged rate, but the other two carriers were not. There is of course nothing in this Court's opinion to indicate an acceptance of such a difference in treatment. Cf. pp. 32-34, 35-36; *infra*.

Looking to the realities, respondent is seeking funds recouped from it because, in the first instance (*i. e.*, in 1944), it billed the Government and collected upon the basis of equipment which not only was not ordered, but, more importantly, was unnecessary in the performance of the transportation involved. Its right to the disputed amount is dependent solely upon its having been entitled to charge for the unordered and unneeded freight cars.

This Court has regularly looked through form to substance in delineating the issue when an action is brought following an administrative deduction from an undisputed claim. In *Reynolds* v. *United States*, 292 U. S. 443, the plaintiff sought to recover a deduction, made from his veteran's pension, of the cost of his hospitalization in a Government institution. Had the action been regarded as one based upon the undisputed claim, *i. e.*, the pension, the court would not have had jurisdiction. Judicial Code of 1911, Section 145, 28 U. S. C. (1940 ed.) 250(1), now 28 U. S. C. 1501. This Court held, however, that the propriety of the deductions was the only question in the case (292 U. S. at 447).

Alcoa Steamship Co. v. *United States*, 338 U. S. 421, provides an even closer analogy to this case. There, the Government paid, upon presentation, the carrier's bill rendered in connection with the shipment of a cargo of lumber on a Government bill of lading. On the post-audit, the Comptroller General discovered that the vessel had been sunk by an enemy submarine, with a total loss of its cargo. As a consequence, he disallowed the payment of the bill and deducted an equivalent amount in making payment on admittedly correct bills submitted by the carrier for the transportation of cargo on

two of its other vessels. The carrier (like respondent here) then brought suit under the Tucker Act on the conceded claim. In its answer, the Government, as here, set forth in detail the erroneous payment which provided the basis for its deduction. The Second Circuit recognized that, the form of the complaint notwithstanding, the charges for the later shipments did not constitute the real subject matter of the litigation. At the very outset of its opinion (175 F. 2d 661), it stated:

> The question in the case is whether the United States overpaid the freight due to the petitioner, * * * upon a cargo of lumber shipped upon the petitioner's ship, "Gunvor."

This Court expressed a similar view (338 U.S. at 422):

> "At bar is the single question of contract interpretation whether a carrier's "Goods or Vessel lost or not lost" provision survives the government standard form bill of lading.[25]

[25] Since the judgment of the court below in the present case, this Court has again implicitly repudiated the theory that a suit following a Section 322 deduction from a conceded bill raises an issue as to the correctness of anything but the carrier's original claim which was invalidated on post-audit. *United States* v. *Chesapeake & Ohio Ry. Co.*, 352 U.S. 77. While the carrier ostensibly brought suit on the conceded bill, the Court described the action as one "to recover the amount of [the] deductions" (352 U.S. at 79) and treated the case as if the invalidated claim had been sued upon directly.

Admittedly, the carrier itself, unlike this respondent, proceeded at all times on the assumption that its recovery hinged upon a showing that its original charges had been correct, with the result that the deduction had been improper. Until this case, however, that seems to have been a generally prevailing assumption. At least we know of no prior instance wherein a carrier has endeavored at trial to take advantage of the pre-audit payment of its bills in the fashion of this respondent. Cf. *United States* v. *Missouri-Kansas-Texas R. Co.*, 194 F. 2d 777, 778 (C.A. 5).

Similar recognition of the nature of judicial proceedings arising out of a Section 322 deduction prompted the promulgation by the Court of Claims, on March 11, 1953, of its "Memorandum Order as to Procedure in Common Carrier Cases," the complete text of which is set forth in Appendix A, *infra*, pp. 48-58. Under that order, a common carrier, within 30 days after its complaint is filed, must file with the Clerk a request for admissions by the Government of "the genuineness of any relevant documents described in and exhibited with the request and of the truth of the material matters of fact relied on by the carrier for recovery in the action." The statement in the request must be:

> * * * sufficiently explicit to show the nature of the dispute and the specific reason or reasons why the plaintiff believes it is entitled to recover higher rates or charges than those allowed by the Government. The word "dispute", as used in the preceding sentence, means *the shipment or shipments with respect to which the General Accounting Office or other agency of the Government determined that the carrier's charges had been overpaid or refused to pay the carrier's supplemental bills covering such shipments, rather than subsequent shipments which are not in dispute except for the fact that the overpayments determined as to the shipments in dispute have been deducted from the amount of the carrier's bills covering such subsequent shipments.* [Emphasis added.]

Additionally, the memorandum order requires the carrier to furnish a detailed schedule containing complete factual information as to "each of the carrier's bill-

for the shipments in dispute (as distinguished from the * * * subsequent bill from which the GAO made a deduction following its determination of an overpayment on the bill in dispute)." The order further requires a response by the Government admitting, denying, or modifying the facts set forth in the request, or advancing the reasons why it cannot do so (*e. g.*, that there is insufficient information in its possession). The failure of the carrier to comply with the provisions of the order may lead to the imposition of severe sanctions.[26]

If, as the pleadings in the instant case show, and as both Section 322 and this Court's holdings dictate, the present suit is deemed to involve solely the question of the validity of the 1944 charges, the distinction that respondent seeks to draw respecting the burden of proof of the refunding and non-refunding carrier evaporates. Whether or not the carrier has honored the demand for restitution occasioned by the post-audit, it is subject to the principle (see pp. 12-14, *supra*) that it is incumbent upon the claimant against the Government to establish the correctness of those of its claims which are in issue.

Even in the absence of the special considerations present where Section 322 is involved, this Court has recognized that the traditional right of the United States to require a full showing by the claimant is not defeated by the fact that the latter, in the first instance, received full payment on its claim. *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112. In that

[26] The Commissioner may (1) refuse to allow the carrier to support designated claims or prohibit it from introducing in evidence designated documents or items of testimony; or (2) may report the carrier's noncompliance to the court for appropriate action, which may include dismissal of the petition or any part thereof.

case, the Postmaster General had concluded that for a period of twelve years the Government, by reason of a continuing mistake of fact, had overpaid the carrier for the transportation of mail. He thereupon deducted from a current bill the amount of all prior overpayments. The carrier brought suit under the Tucker Act, challenging the deduction. Speaking for a unanimous court, Justice Brandeis rejected the contention that the validity of the deduction should have been established by the Government before it was made, observing that the United States "was under no obligation to establish the illegality [of the prior overpayments] by suit" (252 U.S. at 121). Establishing the illegality of the payments to respondent in 1944 is, of course, precisely what the court below has held that the Government was obligated to do.[27]

With one qualified exception (see p. 38, note 29, *infra*), the lower courts have likewise placed the full burden on the claimant to prove that a deduction by the United States was improper, *i.e.*, that the claim actually in issue was correct.

In *Suncook Mills* v. *United States*, 44 F. Supp. 744 (D. Mass.), which arose in the same district court as this case, the Comptroller General had set off against a concededly correct claim an indebtedness to the United States arising from alleged overpayments to

[27] In its brief in opposition (p. 8), respondent endeavored to distinguish *Grand Trunk Western* on the ground that suit was here brought on the conceded claim. For the reasons already developed, this purported distinction is without merit. And we think there is a similar lack of substance to respondent's additional assertion that the *Grand Trunk Western* case must be read as meaning that, while the Government need not establish the incorrectness of the carrier's claim prior to making the deduction, it must do so should the deduction be contested by the carrier in a judicial proceeding.

plaintiff in connection with prior contracts performed by it. Plaintiff then brought suit on the conceded claim to recover this deduction. Determining initially that plaintiff had been overpaid on the earlier contracts unless it had paid certain federal processing taxes which had been included in the bid price on those contracts, the court entered judgment for the Government on the ground that (44 F. Supp. at 746):

> * * * The burden of proof with respect to this matter was on the plaintiff and I find it has failed in its attempt to show that the processing taxes were paid * * *.

In *Eastport Steamship Co.* v. *United States*, 131 C. Cls. 210, the plaintiff had recovered a judgment against the Government from which the Comptroller General had deducted certain amounts purportedly owed the United States by the carrier on a bareboat charter. See 31 U.S.C. 227. The carrier then brought suit to recover the deduction. While the Court of Claims determined, incorrectly we think, that for jurisdictional purposes the suit was to be regarded as on the judgment rather than on the charter,[28] it nevertheless went on to hold that (131 C. Cls. at 212):

> * * * To [recover plaintiff] must show that [the Government] has no claim against plaintiff for the money withheld; which is to say, that plaintiff is not liable to [the Government] on the bareboat charter.
>
> * * * * *

[28] Cf. *Reynolds* v. *United States*, *supra*, p. 32.

> * * * [I]t is the [Government] who is asserting a claim under [the] charter. It asserts it in quite an effective way, by withholding from plaintiff money otherwise due it. This makes it necessary for plaintiff, in order to get the money, to show it is not liable to [the Government] on the charter and, hence, that the withholding is wrongful.

In *Buch Express, Inc.* v. *United States*, 132 C. Cls. 772, certiorari denied, 351 U. S. 940, the carrier had charged the Government for the transportation of certain radar equipment at the double first-class rate applicable to "Range or Height Finders" and "Scientific Instruments, N. O. I." On the Section 322 post-audit, the Comptroller General determined that the shipment came within an entirely different classification which carried the first-class rate. Pursuant to Section 322, he then deducted the difference from sums due the carrier on other shipments. The Court of Claims observed (132 C. Cls. at 776):

> * * * It is noted at the outset that the question in this case is one of fact, *i. e.*, under which classification heading of the tariff do [the radar sets involved] fall. Plaintiff has the burden to show (1) that the classification of this equipment [deemed applicable by the Comptroller General] is wrong and (2) that its classification as either "Range or Height Finders" or "Scientific Instruments, N. O. I." * * * is correct.
>
> We believe the plaintiff has failed to meet the burden of proof on both issues. * * * [29]

[29] It is true that in *Atlantic Coast Line R. Co.* v. *United States*, 140 F. Supp. 569, which involved material facts closely analogous to those of the present case, the Court of Claims expressed the view

The same principle, we submit, controls here. The carrier's burden was to establish that its disputed charges were correct. That duty cannot be met by an allegation that later bills, not in dispute, were correctly rendered.

II. In any Event, the Government Made a *Prima Facie* Showing That Respondent's 1944 Charges Were Incorrect.

Even if this Court should decide that, contrary to the views expressed above, the Government had the initial burden with respect to the correctness of respondent's charges for the 1944 transportation, its burden was satisfied by a showing that respondent delivered cars of a type other than that which had been ordered. This follows from the fact that whether respondent was entitled to furnish, and charge on the basis of, unordered and unnecessary cars hinged upon the resolution of a factual matter within the peculiar knowledge of respondent.

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that "the Government * * * has the burden of persuading us as to the validity of its offset" (although that court, in contrast to the court below in this case, went on to put the burden of going forward on the carrier; see p. 43, *infra*). This expression was not accompanied by any discussion of the considerations heretofore detailed; nor was there mention of the court's earlier holdings to the contrary in *Buch Express* and *Eastport Steamship*.

Further, it is interesting to compare the Court of Claims' statement respecting the burden of proof with its prior disposition of the carrier's motion for summary judgment. *Atlantic Coast Line R. Co. v. United States*, 112 F. Supp. 594. Determining that the sole question before it was whether the carrier had overcharged on the earlier shipments, and that the answer to this question was dependent upon whether cars of the size ordered had been available (see pp. 41-43, *infra*), the court had denied the motion on the ground that (112 F. Supp. at 597):

> In the instant case the plaintiff does not allege that the initial carrier was unable to furnish cars of the size ordered by the Government.

A. *Respondent Could Charge on the Basis of the Furnished Cars Only If the Ordered Equipment Was Unavailable*

It was long an unwritten rule that a carrier, by publishing a tariff listing various sizes of cars, held itself out as being able to furnish them and, consequently, could not charge the shipper more because it furnished cars different from those ordered. *Kaye & Carter Lumber Co.* v. *M. & I. Ry. Co.*, 16 I.C.C. 285. This doctrine was formalized by the Interstate Commerce Commission in Section 6(a) of Rule 34, which, under the heading of "Shipments on Open Cars," provided that:

> If carrier is unable to furnish open car of length ordered, and furnishes longer car, minimum weight shall be that fixed for car furnished, except that if articles are of such length as could have been loaded on car of length ordered, minimum weight shall be that fixed for car ordered.

On January 30, 1942, the Commission promulgated Service Order No. 68. In the preamble, the Commission pointed out that the war emergency required immediate action to prevent shortages of railroad equipment and traffic congestion and that the provisions of Rule 34 in respect to the furnishing, substitution, and use of multiple cars for single shipments, subject to car load rates, resulted in wasteful car service. Cf. *Procter & Gamble Co.* v. *Pennsylvania R. Co.*, 270 I.C.C. 393. The order itself then provided in part that the operation of Rule 34:

> * * * in so far as it permits railway freight cars to be used for the shipment of carload freight otherwise than subject to the carload minimum

weight for each car used be, and it is hereby, suspended.

In *Atlantic Coast Line R. Co.* v. *United States*, 112 F. Supp. 594 (C. Cls.), involving the same situation as here presented, the carrier's principal contention was that the suspension of Rule 34 by Service Order No. 68 had the effect of foreclosing carriers from charging less than the charges for the minimum weights applicable to the type of cars actually used, no matter what type of car had been ordered by the shipper. This construction was flatly rejected by the Court of Claims. Noting that, by its terms, Section 6(a) of the Rule applied only to situations where the carrier was unable to furnish a car of the length ordered by the shipper, the court concluded (112 F. Supp. at 596):

> * * * [T]he suspension, by Service Order No. 68, of unspecified portions of Rule 34 [has] no application to situations where the carrier, though able, did not furnish a car of the size ordered. Since 6(a) did not apply, the suspension of 6(a) would also not apply.

The court then considered, and also rejected, the carriers' additional argument that Service Order No. 68 operated to suspend the unwritten rule enunciated in the *Kaye and Carter Lumber Co.* case, *supra*. It reasoned (112 F. Supp. at 596-597):

> If cars of the size ordered were available it would take no longer to furnish them than it would to furnish other cars, and unnecessarily furnishing longer cars would accomplish only two things: (1) waste of space in cars and of fuel in hauling them

partly empty; and (2) an increase of charges to the shipper for which he got nothing in return. If cars of the size ordered were not available, we can see how Service Order No. 68 might expedite the use of cars. The railroad would not have a tendency to hold back the furnishing of a larger car, as it would under Section 6(a) when it was not going to get paid for the extra size of the car. It would furnish promptly whatever car it could, the shipper would probably accept it, and the shipment would get on its way. While this does not seem to us to be a very cogent justification for Service Order No. 68, as applied to Section 6(a), it must be that, in the expert and informed judgment of the Commission, it was thought that it would serve a useful purpose. But in the situation discussed above where a car of the size ordered was available, it could have served no useful purpose at all and its effects would have been harmful and wasteful. Since the Commission which promulgated it has denied that it was intended as a rate-raising measure, and since its application to such a situation would not improve car service, but would have the opposite effect, we construe the order as not applying to that kind of a situation. We further conclude that if it was intended by the Commission to apply to such a situation it was invalid since it was promulgated under the Commission's authority, granted by the provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C.A. §1 (15), to in an emergency requiring immediate action, suspend the operation of rules, regulations, or practices relating to car service. Under this

authority, the Commission could not take action the only effect of which would be to make car service worse.

The Court of Appeals below accepted the manifest correctness of this holding that, in 1944, a carrier could charge for the unordered equipment which it furnished only if the type of car requested by the shipper was unavailable (R. 41). Moreover, while respondent placed reliance on Service Order No. 68 in the District Court (R. 6), it abandoned that reliance in the Court of Appeals and in its brief in opposition to certiorari in this Court.

B. *Whether the Ordered Equipment Was Available Is Within Respondent's Peculiar Knowledge and the Burden of Proof Could Not Be Imposed Upon the Government*

It is apparent that the carrier, rather than the shipper, must be presumed to know, or have access to, the pertinent information on the question of the availability of cars of the type ordered. Cf. *Atlantic Coast Line R. Co. v. United States*, 140 F. Supp. 569.[39] The record made on the respective motions for summary judgment precludes any other assumption here.

Uncontroverted statements show that the larger cars were "furnished for reasons peculiarly within the

[39] While, as heretofore noted (p. 39, note 29, *supra*), the Court of Claims incorrectly assumed in the cited case (140 F. Supp. at 572) that the "Government * * * has the burden of persuading us as to the validity of its offset," it went on to recognize that (*ibid.*) "*as a practical matter, the evidence as to availability of cars of the size ordered would be in the hands of the plaintiff railroad, and hence it was expected to give us all the information it had.*" [Emphasis added.]

knowledge" of the respondent "and or the initial carrier" and that the United States was "without knowledge of the reasons for the failure to furnish the [cars] ordered" (R. 21). To similar effect, see R. 22, 24, 25, 26.

Contrary to the suggestion of the court below (R. 47), it is irrelevant for present purposes whether the pertinent records are within the possession of respondent or in the possession of the initial carrier. Under the Railway Accounting Rules of the Association of American Railroads applicable to transportation on Government bills of lading, the terminal carrier was under a mandatory duty to collect, on behalf of all participating carriers, all charges on the shipment. See Association of American Railroads, *Railway Accounting Rules Effective October 1, 1944*, Rules 219, 220. The standard Government bill of lading contains a provision of like effect. Consequently, in collecting from the Government on the basis of the furnished cars, respondent clearly acted as agent for the initial carrier. It is accordingly responsible for the production of records within the latter's possession which have a bearing on the correctness of the charges. Cf. *Southern Pacific Co.* v. *Bank of America*, 29 F. 2d 465, 466 (C.A. 7).[31]

[31] Contrary to the views expressed by the court below (R. 47), it is also irrelevant that that there may have been an interval of several years between the initial payment of the carrier's bill and completion of the post-audit by the General Accounting Office (an almost inevitable delay in view of the volume of Government shipments, see p. 25, note 19, *supra*). Under the pre-1940 practice, an equivalent period elapsed during the pre-audit, i.e., between presentation and payment of a transportation bill. This certainly did not lessen the carrier's obligation to prove the correctness of a bill challenged by the pre-audit. And if the present post-audit practice means that the carrier must retain for a longer

In these circumstances, the ruling below that the Government was required to *disprove* the availability of cars of the type ordered conflicts with the consistent holdings of this Court that the burden may not be placed upon a litigant of establishing facts peculiarly within the knowledge of the adverse party. *Selma, Rome Etc. Railroad* v. *United States*, 139 U.S. 560, 566; *United States* v. *Denver and R. G. R. Co.*, 191 U.S. 84, 91-92; *Commercial Corp.* v. *New York Barge Corp.*, 314 U.S. 104, 111; *Federal Trade Commission* v. *Morton Salt*, 334 U.S. 37, 44-45; *SEC* v. *Ralston*, 346 U.S. 119, 126. See also *Tendler* v. *Jaffe*, 203 F. 2d 14, 18 (C.A.D.C.), certiorari denied, 346 U.S. 817; *Fleming* v. *Harrison*, 162 F. 2d 789, 792 (C.A. 8); *New York Life Ins. Co.* v. *Stoner*, 109 F. 2d 874, 876 (C.A. 8), reversed on other grounds, 311 U.S. 464; *Cliett* v. *Scott*, 102 F. 2d 725 (C.A. 5). In the *Denver & R. G. R. Co.* case, the Court emphasized (191 U.S. at 91-92):

> * * * The practical injustice of a different rule * * *. It would require the plaintiff not only to establish a negative, that is, that the timber was *not* cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant; it would impose upon the plaintiff a difficult if not an impossible task to require them to show that the timber was not cut for the construction or re-

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time those records which will be necessary to justify its charges in the event that some question arises in relation thereto, any resulting disadvantage is far outweighed by the advantage accruing to it from the prompt payment following presentation and the use by the carrier of public funds to the extent that the bills included overcharges.

> pair of the railway, though evidence that it was so out could be readily produced by the defendant. It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greenl. Ev. sec. 79, "that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." * * *

We submit that the insistence of the court below that the Government "establish a negative" here works no less an injustice.[32] The Government will rarely be in a position to disprove the carrier's assertion as to the availability of particular railroad equipment.[33] Un-

[32] While conceding that the record did not shed any light upon the "statistical chances" that carriers frequently substituted, for their own convenience, larger cars than those ordered, the court below nevertheless drew the inference from *Atlantic Coast Line R. Co.* v. *United States*, 140 F. Supp. 569, that it had been "the practice of the carriers to furnish cars of the type ordered if such cars were reasonably available" (R. 46). This inference was unwarranted, even if it be assumed (which we deny) that such a line of proof is adequate. In the *Atlantic Coast Line* case, the carrier, required to do so by the court, introduced secondary evidence to the effect that, *at the time and place in question*, the Texas and Pacific Railroad (which had supplied the equipment) always furnished the ordered cars if reasonably available. Recognizing that "[t]here were no doubt some cases, in which railroads, and perhaps this railroad, inexcusably failed to furnish shippers with cars of the sizes ordered," the Court of Claims accepted this evidence as establishing a practice at the particular location (140 F. Supp. at 572). Without discussing the matter of its sufficiency from the standpoint of the resolution of the issue before the Court of Claims, it is obvious that the custom of one railroad at one place does not establish a generally prevailing industry practice, let alone that the initial carrier here did not have the ordered cars available.

[33] As we noted in the petition for a writ of certiorari (p. 8), there are various other types of cases in which the matter of the burden of proof will be critical because the disposition of the controlling issue will depend upon information within the peculiar knowledge of the carrier.

controverted statements show that this is the situation here. See *supra*, pp. 43-44.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
ALAN S. ROSENTHAL,
Attorneys.

AUGUST 1957

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Memorandum Order as to Procedure in Common Carrier Cases

(Issued March 11, 1953)

There are now pending in the Court several hundred cases brought by common carriers for the recovery of freight and passenger transportation charges, and additional suits of the same kind are being filed from time to time. A majority of them were brought during the pendency of proceedings for administrative settlement in order to avoid the bar of the statute of limitations. In many of these actions, there are few, if any, issues to be litigated, and the parties have sought and obtained the permission of the Court to suspend proceedings on the ground that the suits would be settled by administrative action; in others, there are issues to be litigated, but a substantial part of the material facts are not actually in dispute. Practically all of the cases require a consideration of freight classifications, tariffs, and related data, and involve determinations of the rates and computations of the charges due, based on the application of such classifications and tariffs. Nearly all of the actions have resulted from a determination made by the General Accounting Office or other Government agency that there was an overpayment of the carrier's charges by the Government or from refusal of the General Accounting Office or a Government corporation to pay supplemental bills submitted by carriers for claimed undercharges. In all the cases, the Department of Justice relies on the General Accounting Office and other agencies of the Government for the information required in the defense of the actions, including a redetermination by the General Accounting Office of the amounts due the carriers. In order to secure a more expeditious disposition of these cases,

including those to be litigated and those which may be disposed of by settlement without undue delay, it is the opinion of the Court that it is necessary to promulgate this special order, and therefore it is ordered this 11th day of March, 1953, that:

1. In all suits filed by common carriers on and after April 1, 1953, for the recovery of freight and or passenger charges, the carrier shall, at the time the petition is filed or within 30 days thereafter, file with the Clerk of the Court a request for admission by the defendant of the genuineness of any relevant documents described in and exhibited with the request and of the truth of the material matters of fact relied on by the carrier for recovery in the action. The request shall conform to the following requirements:

(A) The request, with accompanying schedules and documents, may be typewritten, or may be printed, mimeographed, or otherwise mechanically reproduced from a typewritten original, provided that all copies filed with the Clerk shall be clearly legible and that the words and figures shown therein shall be in large enough type to be read without difficulty.

(B) When the request is typewritten, an original to be retained by the Clerk and four copies to be served on defendant, as provided in Rule 2, shall be filed by the plaintiff. If the request is mimeographed, printed or otherwise reproduced from a typewritten original, the plaintiff shall, in addition to the five copies prescribed by the preceding sentence, file one additional copy for each Government agency for which the shipment or shipments in suit were made. Such additional copy or copies shall be served on defendant as provided in Rule 2.

(C) The request shall be signed by the attorney of record for the plaintiff. The statements con-

tained therein shall be properly separated and numbered and shall consist of specific statements of material facts which the plaintiff expects to prove as opposed to general allegations of the kind used in pleadings.

(D) There shall be attached to the request copies of any contracts, letters, or other documents (excluding the documents referred to in the schedules required by paragraphs 1(F) and 1(H) hereof) which plaintiff proposes to offer in evidence, in order that the genuineness of such documents may be admitted by the defendant and the necessity of calling a witness to identify the same may be avoided.

(E) The statements in the request shall be sufficiently explicit to show the nature of the dispute and the specific reason or reasons why the plaintiff believes it is entitled to recover higher rates or charges than those allowed by the Government. The word "dispute", as used in the preceding sentence, means the shipment or shipments with respect to which the General Accounting Office or other agency of the Government determined that the carrier's charges had been overpaid or refused to pay the carrier's supplemental bills covering such shipments, rather than subsequent shipments which are not in dispute except for the fact that the overpayments determined as to the shipments in dispute have been deducted from the amount of the carrier's bills covering such subsequent shipments.

(F) Where the claim is for the recovery of charges for the transportation of *property* for the Government, there shall be attached to the request a detailed schedule, prepared by or under the supervision of the general auditor, comptroller, or

other principal accounting officer of the carrier. The schedule shall contain the following factual information:

(1) The number of each of the carrier's bills for the shipments in dispute (as distinguished from the number of a subsequent bill from which the GAO made a deduction following its determination of an overpayment on the bill in dispute).

(2) For each bill of lading in dispute, covered by each bill referred to in (1) above, the following facts:

(a) The number and symbol of each bill of lading;

(b) the date of the shipment;

(c) the origin and destination of the shipment;

(d) a description of the commodity or commodities shipped, including a description of the packing where this affects the rate;

(e) car number and initial;

(f) the weight of the shipment, including the minimum carload weight when greater than the actual weight;

(g) when the shipment in dispute consists of one or more carloads of mixed commodities, a description of the different commodities and the respective weights thereof loaded in each car, including minimum carload weights where such weights affect the rates;

(h) the rates claimed for each article in the shipment and for any accessorial services;

(i) where land-grant rates are involved, the percentage of deduction, or the percentage to be paid;

(j) the total freight charges on each bill of lading;

(k) amounts refunded by carrier, if any;

(l) if the overpayment determined by GAO or other agency has been deducted from the carrier's subsequent bill or bills, the number of such subsequent bill or bills and the amount deducted;

(m) the total amount paid the carrier;

(n) the balance due;

(o) specific reference to the item or items in designated tariffs authorizing the charges claimed, including the classification rating if necessary, and authorization for any accessorial charges claimed; or to a Section 22 quotation;

(p) the Government file reference number as obtained from GAO Form 1003, the Certificate of Indebtedness, or other document issued by the GAO;

(q) if the shipment in dispute consists in whole or in part of a through transit movement, (1) the through assessable charges from the original point of shipment to the final destination, including a description of the commodity, the transited weight, the through rate—less land-grant deduction, if any—the tariff or special authority for the through rate used; and, if local tonnage is involved, the weight thereof, the points between which local tonnage moved and the rates and charges assessed against such tonnage; (2) detail of the net amounts paid to and beyond the transit station, including references to the "inbound" and "outbound" shipments by bill of lading number, and symbol, date of shipment, origin

and destination, weight, rate, and the net amounts paid to the respective "inbound" and "outbound" carriers, naming them and identifying the bill numbers on which such payments were made; and (3) the balance due, i.e., the difference between the through assessable charges, including the charges on local tonnage, if any, and the respective net amounts paid on the inbound and outbound shipments;

(r) a brief statement as to the basis for the claim or other brief statement which the carrier deems necessary to explain the peculiarities of the shipment.

(G) The schedule shall be certified by the general auditor, comptroller, or principal accounting officer of the carrier as follows:

I, ... the .....
(Name) (Title)
....., of the .....,
(Name of Carrier)
do hereby certify that the above and foregoing schedule has been prepared from the books and records of said company for use in a suit in the United States Court of Claims, entitled .....
..... vs. The United States, No. .....,
and that to the best of my knowledge, information, and belief the matters contained therein are true and correct.

To certify which, witness my hand at .....
..this .....day of .....,..... 19...

.....

Signature of General Auditor, Comptroller or principal accounting officer.

(H) Where the claim is for the recovery of charges for the transportation of *passengers*, for account of the Government there shall be attached to the request a schedule, prepared by or under the supervision of the general auditor, comptroller or other principal accounting officer of the carrier. The schedule shall contain the following factual information:

(1) The number of each of the carrier's bills in dispute, as distinguished from the number of a subsequent bill from which the GAO made a deduction following its determination of an overpayment on the bill in dispute;

(2) for each transportation request or warrant in dispute covered by each bill referred to in (1) above, the following facts:

(a) the symbol and number of each Government transportation request or warrant in dispute;

(b) the date of service;

(c) the origin and destination of the travel;

(d) the class or type of service;

(e) whether the travel was "one way" or "round trip";

(f) the number of the special movement, if any;

(g) the route of travel;

(h) the number of persons that traveled;

(i) the gross per capita fare;

(j) the amount of land-grant deduction;

(k) the assessable passenger charges;

(l) the amount paid;

(m) amounts refunded by carrier, if any;

(n) where an overpayment was determined by the Government and deducted from a car-

rier's subsequent bill, the number of such subsequent bill and the amount of the deduction;

(o) the total amount paid;

(p) the balance due;

(q) the tariff reference and item or special rate authority;

(r) the Government file reference;

(s) a brief statement as to the basis for the claim, including, where appropriate, a brief explanation showing the extent to which the ticket issued by the carrier was not used and the value of the unused part of the ticket.

(I). The schedule covering the transportation of passengers shall be certified in the same manner as provided in (G) above, except that where a request includes schedules pertaining to claims for both the transportation of passengers and freight, one certification shall suffice for all schedules.

2. Promptly after the filing of the plaintiff's request, the Commissioner to whom the case is assigned shall, by memorandum order filed with the Clerk, fix a reasonable time within which the defendant shall file its response to the request. A copy of such order shall be served on the parties as provided in Rule 3.

3. The defendant's response shall consist of an original to be filed with the Clerk and four copies to be served on plaintiff as provided in Rule 3. The response shall be signed by defendant's attorney of record and shall comply with the terms of paragraph 1(A) hereof.

4. The defendant shall file such response within the time fixed by the Commissioner, agreeing to the separate items of fact, modifying the same in accordance with the facts known by the defendant, specifically denying the same, or setting forth in detail the reasons why it cannot truthfully admit or deny designated portions of the request.

If the defendant finds that the schedule attached to the plaintiff's request, or any portion thereof affecting the amount claimed is incorrect, there shall be attached to the response a schedule prepared by the defendant, setting forth the facts and figures in detail with respect to any such incorrect items in plaintiff's schedule or schedules and containing a specific reference to the item or items in designated tariffs, Section 22 quotations or other authority relied on by the defendant.

5. Except where the response details the reasons why the defendant cannot admit or deny a particular statement in the request, any fact not so modified or denied in the response shall be deemed admitted, and the failure of the defendant to file its response within the time specified by the Commissioner shall be taken as an admission of all of the facts as set forth in the request.

Where the request sets forth any facts that are within the knowledge of the General Accounting Office or of the department or agency of the defendant for which the transportation was performed—and these specifically include but are not limited to the facts and figures which plaintiff, by this order, is directed to include in its schedules—a response stating that defendant cannot truthfully admit or deny such facts or a denial based on a lack of knowledge by defendant's attorney of record, shall be deemed an admission thereof: Provided, that such a response shall not be deemed an admission if accompanied by the sworn statement of the official in charge of the records that a search has been made for the necessary documents or information and that the documents or information cannot be found.

6. The Commissioner may invoke the provisions of this order with respect to any pending case of the class covered by the terms hereof, including cases in which

an interlocutory order has been entered by the Court in favor of the plaintiff on the issues of fact and law relating to the right of plaintiff to recover. In such pending cases, the Commissioner shall fix the time within which plaintiff's request, as well as defendant's response thereto, is to be filed.

The Commissioner may also invoke the provisions of this order, or applicable portions thereof as specified by him with respect to any case of the class covered by the terms of this order, where the trial in the first instance has been limited to the issues of law and fact relating to the right of plaintiff to recover. In that event, and in a case where the petition covers a number of bills of lading, involving a common issue of law or fact, the plaintiff's request and the defendant's response shall be limited to the matters that are essential to enable the Court to determine the issues of fact and law relating to the right of plaintiff to recover, and the schedules attached to plaintiff's request and to defendant's response shall cover only one typical bill of lading or such representative bills of lading as the Commissioner decides are necessary to enable the Court to determine the question of defendant's liability. If the Court holds that plaintiff is entitled to recover, it shall enter an interlocutory order, reserving the determination of the amount of the recovery for futher proceedings.

7. In all cases where the defendant's answer has not been filed at the time the provisions of this order are invoked by the Commissioner, the time for filing defendant's answer and any counterclaim asserted by it shall, without regard to the provisions of Rules 16 and 17, be contemporaneous with the date fixed by the Commissioner for filing defendant's response to plaintiff's request. At its option, the defendant may include the response in its answer or counterclaim, which plead-

ings, nevertheless, shall otherwise comply with the rules applicable to them.

8. The Commissioner may, in his discretion, grant necessary extensions of time for compliance with any of the provisions of this order and shall, prior to the time the case is submitted to the Court, resolve all questions and disputes with respect to the procedure to be followed in compliance with this order.

9. Where all genuine and material issues of fact are disposed of by the request and the response or by the defendant's failure to file its response within the time specified by the Commissioner, judgment may be entered on motion for summary judgment or on recommendation of the Commissioner as set forth in his memorandum report.

10. In the event a plaintiff in any action within the purview of this order fails or refuses to comply with the provisions hereof, the Commissioner may (i) refuse to allow it to support designated claims or prohibit it from introducing in evidence designated documents or items of testimony; or (ii) may report such noncompliance to the Court for appropriate action, which may include dismissal of the petition or any part thereof.

By the Court:

MARVIN JONES,
Chief Judge.

APPENDIX B

ASSOCIATION OF AMERICAN RAILROADS

Transportation Building
Washington, D. C.

October 5, 1937.

J. J. PELLEY, President.

Captain H. E. COLLINS,
Assistant Director, Procurement Division,
Treasury Department,
Washington, D. C.

Dear Captain COLLINS:

The railroads members of the Association of American Railroads, which comprise about 98% of all the Class I railroads in the United States, have been very much concerned by the long delay in securing payment for transportation services rendered for the U. S. Government. We know further, from conferences with the officers of the American Short Line Railroad Association, that their lines have been and are experiencing similar difficulty. These delays are not justified and the carriers should not be expected to finance the Government as they are now doing, insofar as transportation is concerned. Furthermore, the railroads are necessarily large borrowers and in that connection are required as a condition to their obtaining the necessary capital to pay substantial interest charges on all such borrowed money, whereas on the other hand the Government is paying no interest on its delayed payments to the railroad companies, which delays in many instances run over a year and invariably are not settled for sixty to ninety days. Although the railroads pay interest for the money they borrow, they cannot under the law collect interest from the Government

no matter how long settlements may be delayed. This is obviously unfair.

Under the law applicable to commercial shippers, transactions with railroads are required to be on substantially a cash basis. Shippers are required to pay freight charges within 48 hours, on a majority of the traffic, and in no case are they permitted credit in excess of 96 hours. It appears to us, and particularly under the present unfortunate financial position of the railroads, that the carriers ought to receive settlement from the Government within 96 hours after a bill has been presented and that would be possible providing the proper machinery were set up and the proper instructions issued.

This matter is of very much greater importance today than it has been in years past, for the reason that under present conditions the Government is engaged in shipping to a very much greater extent than ever before. Due to the various bureaus and other agencies, particularly in connection with relief work and in connection with some of the governmental corporations that have been organized, the Government is today handling much tonnage which was previously commercial traffic so that the delay in settlement for the transportation charges is much more serious to the railroads today than would have been the case a decade ago. It should also be borne in mind in connection with Government freight shipped under Government bills of lading the railroads are under the law not assessing their commercial rates but are making such discounts as the law requires because of land-grants and which in many instances today means the handling of this traffic on a basis below the actual cost of performing the service. These facts are mentioned only

as indicating the very great importance of providing some sort of a system which will permit the more prompt payment of these charges.

That you may have a picture of the situation, your attention is directed to the fact that as of July 1, 1937, there were 94,182 outstanding unpaid railroad bills against the Government amounting to $11,749,774, all of which bills had been rendered prior to May 1, 1937, and of these bills and this amount there was unpaid $4,683,946, representing 35,761 bills which had been rendered prior to January 1, 1937.

We feel very sure that you and the other officers of the Government will agree that this situation is one that is grossly unfair and that corrective action should be taken that will render impossible such long delays in payment for services rendered.

We are also of the opinion that it is not sufficient for us to simply complain of this situation but that in addition thereto we ought to suggest a remedy which in our judgment is both practical and legal and which can easily be made operative without the assumption of any risk insofar as the Government is concerned, providing you and your associates will put the suggested plan in operation and with such instructions issued as may be needed in connection therewith. With this thought in mind, we very respectfully submit for your consideration the following:

We believe that the delay in the payment of transportation charges by the Government to the railroads would be absolutely avoided if the various departments contracting for transportation were instructed to pay the bills as rendered and after payment have these bills referred to the General Accounting Office or such other governmental auditing office as might be desired for audit. In the event that this audit reveals an over-pay-

ment, then claim be presented to the carrier for the amount thereof which will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit. Attention is further directed to the fact that the railroads would never have, under such a plan, more money than the Government lawfully owed for the reason that the Government is shipping daily and is currently obligated to the railroad companies for transportation charges. This would place the handling of governmental transportation charges on substantially the same basis as applies in connection with commercial transactions.

I am very sure from our previous negotiations with you and others connected with the Government with regard to the same subject that there exists no differences as between us as to the necessity of more prompt payment than has heretofore prevailed. I hope that you and your associates may consider the suggestions contained herein as reasonable and practical and that we may rely upon your good offices to bring about some such arraingement. It may be that you may desire to discuss this matter and perhaps make some suggestions that differ somewhat from the plan proposed herein. Should this situation develop, I want to assure you that either the officers of this Association or the appropriate officers of this Association with a committee of the lines will gladly discuss the subject with you at such time and place as may be mutually satisfactory. I feel sure that we both desire to obtain a very substantial improvement in the situation that now exists, and I am of the opinion that if these matters can be handled along lines somewhat similar to those which we have recommended that it will not only create a much better feeling as between the railroads and the

Government, but in addition thereto will materially reduce the expenditures of both parties in the handling of these accounts and give to the railroads money which is due and greatly needed.

With very kindest regards, I beg to remain.

Yours most cordially.

(Signed) J. J. PELLEY.

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Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 415

UNITED STATES OF AMERICA,
Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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For the Respondent.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 574.

UNITED STATES OF AMERICA,
Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The oral opinion of the United States District Court for the District of Massachusetts (R. 39) is not reported. The opinion of the Court of Appeals is reported at 236 F. (2d) 101.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

1. Whether section 322 of the Transportation Act of 1940 abrogates the well-established rule that the party litigant alleging a claim must prove that claim.

2. Whether said Act places upon the carrier-plaintiff the burden of setting forth in its complaint anything with respect to prior transportation contracts between the parties; or of making any showing that on an overall basis the Government-defendant has not overpaid the carrier.

3. Whether said Act permits the Government as a counter-claimant to recover in set-off on the basis of an overpayment without sustaining the burden of proving such overpayment.

Statute Involved.

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66, provides as follows:

> "Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the

amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

Statement.

This action was brought by the respondent; The New York, New Haven and Hartford Railroad Company, under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346 (a) (2), to recover from the United States sums due for transportation services performed by the Railroad in the carriage of Government property in the year 1950 (R. 3-4). The pertinent facts in the case may be summarized as follows:

On August 8, 1950, the respondent delivered a carload of household effects to the petitioner at Newport, Rhode Island, thereby completing its performance of a transportation contract signed by the petitioner and bearing Government bill of lading No. N. 17377374 (R. 3). The lawful charges for these transportation services under applicable tariffs were $1143.03 (R. 3). The respondent on June 14, 1951, made demand upon the United States for payment of this sum, which demand was refused with the exception of the sum of $117.77 paid to the respondent by the United States on July 16, 1951 (R. 3, 5). Thereafter the respondent on May 14, 1953, filed suit in the District Court against the United States under the Tucker Act, demanding judgment in the amount of $1143.03 due and owing on the 1950 shipment (R. 3-4). The substitute answer filed by the United States admitted the respondent's performance of the 1950 transportation service and the correctness of the respondent's charges therefor (R. 5). However, in this answer the petitioner denied that the sum of $1143.03 was due and owing, claiming that the respondent was allowed

the full amount of the sum sued upon with $117.77 being paid by check in 1951 and the balance of $1025.26 being credited under the provisions of section 322 of the Transportation Act of 1940, on account of alleged overpayments previously made by the United States on certain designated transportation bills submitted by the respondent for the transportation of goods in 1944 (R. 5-6). The answer set forth as the grounds for the petitioner's determination of overpayment the statement that charges in the 1944 bills had been computed on the basis of the size of the freight car furnished and used and not on the basis of the size of the car ordered by the United States (R. 6). The petitioner further alleged in its answer that the respondent at no time furnished the Government with facts respecting its failure to supply cars of the size ordered (R. 6). To this pleading the respondent filed a reply admitting the receipt of the check in the amount of $117.77 but denying that it had overcharged the United States with respect to the four shipments in 1944 (R. 6-7). The respondent further alleged that the "defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 was in full force and effect and applicable thereto," and that "the plaintiff . . . fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation" (R. 6-7).

In 1942, as a wartime measure to effect economies in the use of railroad cars, the Interstate Commerce Commission issued Service Order No. 68, which suspended the provisions of section 6(a) of Rule 34 of the rules of the Interstate Commerce Commission (App. A, pp. 16-17). In pertinent part this latter rule specified that, if a carrier was unable to furnish a car of the length ordered and therefore substituted a longer car, it could legally charge the shipper

only on the basis of the size of the car ordered (App. A, pp. 17-18). With the suspension effected by Service Order 68 the carrier could thereafter legally make charges for the size of the car furnished in those instances where it was unable to supply a car of the length ordered (App. A, p. 17).

With respect to the 1944 shipments it appears that the initial carrier had furnished on each occasion a car of greater length than that ordered, and subsequently the respondent, as the terminal carrier, had presented bills to the Government at the rate applicable to cars of the size furnished (R. 24-25, 26, 28, 30, 31-32). Pursuant to section 322 of the Transportation Act of 1940 these bills were paid (R. 25, 27, 29, 30, 32). Some six years later, however, the bills were post-audited by the General Accounting Office and, without undertaking to determine the important extrinsic fact necessary to establish that there had, in fact, been an overcharge in 1944, namely, whether the initial carrier was able to supply freight cars of the smaller sizes ordered, the General Accounting Office made a deduction from a bill submitted by the respondent in June, 1951 (covering charges on the 1950 transportation sued upon), in the amount of the difference between the charges for the cars ordered and those furnished (R. 25, 26, 27, 28, 29, 30, 31, 32, 33; App. A, p. 22).

On these facts and the state of the pleadings before it, the District Court ruled that, in order for the plaintiff to recover, it need allege nothing beyond the facts of the particular 1950 shipment set forth in the complaint, the bill for which transportation the United States had refused to pay (R. 39). The Court reasoned that, since the plaintiff had brought suit upon a particular contract of transportation, other contracts claimed by way of set-off or otherwise would have to be set up in the defendant's answer and proved by the defendant (R. 39).

Thereafter the Railroad filed a motion for summary judgment with affidavit attached demanding judgment in the sum of $402.84,[1] and the United States moved for judgment in its favor on the ground that the Railroad had "failed to plead facts entitling it to recover herein" (R. 41-43). On November 23, 1955, the District Court entered judgment for the Railroad in the reduced amount of $402.84 and at the same time denied the petitioner's motion for judgment (R. 43-44). The Court of Appeals affirmed (App. A, p. 23).

In its opinion the Court of Appeals rejects the construction of section 322 urged upon it by the petitioner to the effect that, when a deduction is made by the Government upon post audit against an amount due the carrier on another transaction, then in order for the carrier to recover the amount admitted due on the subsequent transaction it would have the burden of alleging and establishing that there was no overpayment in the prior transaction used by the Government by way of set-off (App. A, p. 21). The Court found "no language in § 322 justifying this extraordinary result" (App. A, p. 21). The Court reasoned that this would upset the established order of things; and that, if the intent of Congress had been to accomplish such result, it certainly would have used appropriate language to that end (App. A, pp. 19-22). In the Court's view "all that § 322 does is to authorize and direct disbursing officers of the United States to pay transportation bills upon presentation, without waiting for audit or settlement by the General Accounting Office. This the United States might choose to do, just as a private shipper might pay the bills rendered by a carrier without making an audit" (App. A, p. 21).

[1] The reduction in the respondent's demand for judgment resulted from administrative negotiations wherein the parties agreed that the Government should be allowed a credit of $622.42 (R. 39-41).

Argument.

The record in this case generates no compelling reason for the issuance of a writ of certiorari.

1. There is no conflict between the holding in this case and any decision of this Court.

2. There is no conflict between the holding in this case and any decision of the other Courts of Appeals or other lower federal courts whose judgments are final in the absence of Supreme Court review.

3. This case has been given inflated importance.

4. The decisions of the Courts below in this case are correct.

1.

Despite the efforts of the petitioner from the very outset to confuse the real issue of the litigation in question, the Railroad sued the Government to collect for services rendered in 1950, not 1944. It was the Government that brought 1944 into the picture.

There is no conflict between the holding of the Court of Appeals and any decision of this Court. The Court of Appeals here held that the Government must be treated as any private shipper. This Court has not held to the contrary. That the United States, as a party litigant, must be treated as any private party has been the longtime holding of this Court; and which was so ably expressed by Mr. Justice Holmes in *United States v. Norwegian Barque "Thekla," Her Tackle, Etc.*, 266 U.S. 328:

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

The petitioner construes the case of *Grand Trunk Western Railway Co. v. United States*, 252 U.S. 112, as "strikingly analogous to the case at bar". (Petition, p. 9). A careful reading, however, shows that to be a distorted conclusion. That suit was brought in the Court of Claims (53 Ct. Cl. 473) to "recover the amount" deducted for the twelve years. In the case at bar the suit was not to recover the amount deducted because of the 1944 charges; rather, it was to collect charges admittedly due for 1950 services. In the *Grand Trunk* case the balances due for carrying the mails were regarded as running accounts under successive contracts. That is not so in the case at bar, where the suit was on a 1950 contract and the Government set-off was on a 1944, and in no way related, contract. Likewise, as to the *Grand Trunk* case the petitioner here arrives at an extraordinary conclusion concerning the impact of the Court's holding that the United States (Postmaster) "was under no obligation to establish the illegality by suit." The petitioner would have us believe that the Court meant that the United States did not at any time have to establish the fact of overpayment in any kind of lawsuit and no matter under what circumstances the question of overpayment arose; whereas the respondent says that the true construction of that holding is that as a first step to the act of making the deduction there is no requirement that the Government institute legal action against the carrier to bring about a determination that in fact there was an overpayment. Stated another way, the Government can make its own determination of overpayment without making any offer of proof as to the basis for such determination, unless and until it asserts such overpayment as set-off in a judicial proceeding. At such time it must meet the requirements of such proceeding.

The respondent's construction is supported by the language of the Court of Appeals decision in our case (App. A, p. 22):

> "This means that, before the claimed setoff must be accepted in a judicial proceeding, the existence of such overpayment must be objectively determined, in fact and in law; it is not enough merely that some accounting officer has unilaterally asserted the existence of such overpayment."

The petitioner asserts that the holding of the Court below conflicts with several cases cited on pages 11 and 12 of its petition in which this Court applied to the facts before it the general rule of evidence that, when certain facts lie peculiarly within the knowledge of one of the parties to litigation, that party has the burden of coming forward with evidence as to those facts. However, even a most casual reading of these cases demonstrates that the professed conflict is not a real conflict. On the contrary, the fact situation and legal issues involved in each case cited differ from those present in the other cases and are in no respect similar to the facts and issues in the case at bar.

Further, we believe that this Court will agree there is not even a conflict in principle between our case and the cited authorities. In the opinion below the Court of Appeals carefully explored the propriety of applying that rule of evidence to the instant case and expressly found that the state of the record did not justify such a result (App. A, pp. 23, 24). The Court of Appeals prefaced its discussion on this phase of the case with the statement: "Of course, rules as to burden of proof, rebuttable presumptions, burden of going forward with the evidence, etc., are established as matters of fairness, and convenience or availability of proof"[1] (App. A, p. 23). It then indicated that, if as a fact the evidence as to availability of cars of the size ordered was peculiarly within the knowledge of the

[1] See also Wigmore on Evidence, vol. IX, sec. 2486, p. 275.

carrier, it might be fair to impose upon the carrier the burden of coming forward with such evidence. But, as the Court found, "That does not seem to be so in the case of the present appellee-plaintiff, which was the terminal carrier, not the initiating carrier" (App. A, p. 24). In the absence of any direct evidence in the record showing as a fact that the carrier was in possession of the information as to availability at the time and place of shipment of cars of the size ordered, the Court of Appeals was impressed with the fact that the General Accounting Office had been "painfully slow" in post-auditing 1944 transportation bills, consuming a period of six years before statement of overcharge was made; whereas the carrier was not required by law to keep records more than three years (App. A, p. 24).

2.

There is no conflict between the decision in the case at bar and decisions rendered by other Courts of Appeals or lower federal courts whose judgments are final in the absence of Supreme Court review. Quite to the contrary, it is to be noted that the only other case on all fours with the case at bar was decided in conformity with the decision below.

In *Atlantic Coast Line R. Co. v. United States* (1956), 140 F. Supp. 563, the Court of Claims stated at page 572:

> "Since the Government is seeking to set off, against an admittedly valid claim, a claim which it asserts arises out of another transaction, it has the burden of persuading us as to the validity of its offset."

In the case at bar the Court of Appeals, noting its agreement with the *Atlantic Coast Line* case, quoted with ap-

proval the language of the Court of Claims set out above (App. A, p. 22).

3.

The petitioner attaches an inflated importance to the issue of this case. It cited the dollar value of the large number of notices of overpayment issued by the General Accounting Office (Petition, p. 8, and footnote 5)—for a period, incidentally, that has no bearing here. Yet for some reason it does not recite the number of instances when the overpayments encompassed by that same tabulation were not disputed by the carrier. The respondent suggests that the percentage of real controversy between the Government and the carriers over notices of overpayment as compared to the total transportation charges is of minor significance. Take this case, for instance. The total amount of the Government set-off was $1025.26. The respondent had no quarrel with the Government's reason for wanting to set off $622.42 of that amount. Thus the judgment below was for $402.84. That state of affairs does not create any "crucial" situation as the petitioner contends.

Nowhere in its opinion did the Court of Appeals conclude as contended by the petitioner at page 7 of the petition that "prompt, unaudited payment by the Government, pursuant to Section 322, permanently frees the carrier of the burden of justifying its charges . . ." What it did conclude was that, in those instances where the carrier would have such a burden prior to the enactment of section 322, this was to be the case after passage of section 322, and that, on the other hand, in those cases where the burden would have been upon the Government to show an overpayment prior to section 322, this same situation would prevail after the date of section 322. The Court concluded that the particular facts of the present case placed it within the latter category mentioned above.

4.

The ruling of the District Court upon the pleadings before it and the contentions then advanced by the parties was the only ruling consistent with logic and sound reasoning. As that Court recognized, the issue before it was not complex (R. 34-35). The pleadings had framed for its decision a simple issue of pleading and proof. It did not feel required to pass on the narrow question of the proper assignment to the parties of burden of proof or burden of evidence as to each and every particular fact, since the United States had contended that, on the circumstances of the case, before the Railroad could recover, it had to "plead" facts with regard to prior transactions between the parties and in addition make an overall showing that the Government had not overpaid the Railroad on any of these prior transactions (R. pp. 36-38). The Court rejected this contention in the following terms:

> "I rule as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plaintiff. This is a suit upon a particular contract of transportation. Other contracts claimed by way of setoff or otherwise must be set up in the defendant's answer and proved by the defendant." (R. p. 39.)

The respondent submits that the correctness of this ruling is immediately evident. To engage in lengthy discussion in justification thereof would only labor the point.

Likewise the decision of the Court of Appeals is clearly correct and unimpeachable by the petitioner. In a well-reasoned opinion that Court carefully considered and dis-

posed of all the outstanding issues and contentions of the parties, including those now urged upon this Court by the Government.

As previously mentioned, it found, contrary to the misleading recitation of the petitioner, that prior to the enactment of section 322 the burden of establishing the correctness of its charges was by no means necessarily cast upon the carrier in every case where a dispute between it and the United States as to transportation charges was ultimately brought into a court of law.

The Court of Appeals then considered the legislative history and wording of section 322 and concluded that that section was directed primarily to the administrative phase of payment and settlement of accounts between carriers and the Government; that is, it conferred upon the agents of the United States authority to make payment upon presentation, substituting a post-audit for a pre-audit, and, in addition, confirmed the pre-existing right of the Government to deduct any amount of administratively determined overpayments from subsequent transportation bills. This section, however, was not intended to have a further effect once a dispute as to proper charges had been transferred from the administrative stage to a judicial proceeding.

Concededly, the Congress which enacted section 322 knew that according to the prevailing practice the United States did not pay for transportation charges until after they had been audited.[1] And presumably it understood that, when called upon, the carrier would have to furnish certain facts to sustain its charges in order to receive payment

[1] Although, as the Court points out at page 20 of App. A, under the terms of section 3 (2) of the Interstate Commerce Act the carrier was not required to relinquish possession of a shipment prior to payment even in those instances where the United States was the shipper.

without recourse to litigation. If litigation eventually would ensue under the pre-section 322 practice, then it might be correct to say that in the usual course of events the carrier would be the party who would institute suit, since it had not been paid for services rendered. And as the suitor the carrier would unquestionably have the burden of proof as to the elements of its claim. In this respect the Government policy as to payment of claims is significant because in a sense the burden of proof and the burden of allegation are incident to and follow the fact of payment or withholding of payment. Rules of evidence do not operate in a vacuum but are allocated to one party or the other depending upon the context of their actions. But, even if Congress, while being well apprised of the Government's policy of payment on the administrative level, also knew of the practical effect of this policy of payment on later judicial proceedings between the carrier and the Government, it most certainly does not follow that, by changing administratively the Government's payment policy from pre-audit to post-audit, it intended to change the judicial incidents flowing from the fact of payment or lack of it. If that were the intent of Congress, it would have specified in plain language that in every case where litigation ripened from previous administrative dealings of the parties, no matter who instituted it, the carrier must always carry the burden as to the correctness of its charges.

Rather than give such an interpretation to section 322—which specifies nothing regarding burden of proof, nothing regarding procedure in litigation between carriers and the United States—the Court of Appeals adopted the only reasonable construction, *i.e.*, that the inclusion of that paragraph of section 322 relating to deductions was dictated by an abundance of caution to guard against the hazard of a possible interpretation that Congress had legis-

lated out of existence the traditional right of the United States to a set-off in situations where other suitors would enjoy a like right.

The effect of section 322, as recognized in the Court's opinion, was to bring the United States into closer parity to private shippers. If they must pay transportation charges prior to an investigation as to their correctness, and wait to sue for or deduct the amount of any overpayment, so too must the United States after the enactment of section 322. From the point of view of the carriers this is admittedly a desirable result and one which Congress for overriding considerations might freely choose to confer. Having done so, as the Court of Appeals found, no specious argument of the Government should now serve to take away that right.

Conclusion.

The decision of the Court below is clearly correct. There is no conflict of decisions. The petitioner has failed to present with accuracy, brevity and clearness any considerations warranting a further review. Therefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel,

ARTHUR D. HEALEY,
Assistant Counsel,
For the Respondent.

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Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 45.

UNITED STATES OF AMERICA,
Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

Opinions Below.

The oral opinion of the United States District Court for the District of Massachusetts (R. 33-34) is not reported. The opinion of the United States Court of Appeals for the First Circuit (R. 39-47) is reported at 236 F. 2d 101.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 10, 1956 (R. 47). By order of Mr. Justice Frank-

further, dated November 5, 1956, the time for filing a petition for a writ of certiorari was extended to November 15, 1956 (R. 48). The petition was filed on November 13, 1956, and was granted on January 14, 1957 (R. 48). 352 U.S. 965. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

Questions Presented.

For transportation services performed in 1950 against which only part payment was made, carrier-respondent sued Government-petitioner in 1953. The Government answered claiming a setoff credit pursuant to section 322 of the Transportation Act of 1940 for an alleged overpayment by it for transportation services performed in 1944.

The following questions are presented:

1. Whether section 322 of the Transportation Act of 1940 places upon a carrier-plaintiff the burden of setting forth in its complaint anything with respect to prior transportation contracts between the parties; or of making any showing that on an overall basis the Government-defendant has not overpaid the carrier thereon.

2. Whether said Act allows the Government as a counter-claimant to recover in setoff on the basis of an overpayment without sustaining the burden of proving such overpayment.

Statute Involved.

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66, provides as follows:

> "Payment for transportation of the United States mail and of persons or property for or on behalf of

the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

Statement.

This action was brought by the respondent, The New York, New Haven and Hartford Railroad Company, under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346 (a) (2), to recover from the United States sums due for transportation services performed by the Railroad in the carriage of Government property in the year 1950 (R. 3-4). The pertinent facts in the case may be summarized as follows:

On August 8, 1950, the respondent delivered a carload of household effects to the petitioner at Newport, Rhode Island, thereby completing its performance of a transportation contract signed by the petitioner and bearing Government bill of lading No. N. 17377374 (R. 3). The lawful charges for these transportation services under applicable tariffs were $1143.03 (R. 3). The respondent on June 14, 1951, made demand upon the United States for payment of this sum, which demand was refused with the exception of the sum of $117.77 paid to the respondent by the United States on July 16, 1951 (R. 3, 5). Thereafter the respondent on May 14, 1953, filed suit in the District Court against the United States under the Tucker Act, demanding judgment in the amount of $1143.03 due and owing on the 1950

shipment (R. 3-4). The substitute answer filed by the United States admitted the respondent's performance of the 1950 transportation service and the correctness of the respondent's charges therefor (R. 5). However, in this answer the petitioner denied that the sum of $1143.03 was due and owing, claiming that the respondent was allowed the full amount of the sum sued upon with $117.77 being paid by check in 1951 and the balance of $1025.26 being credited under the provisions of section 322 of the Transportation Act of 1940, on account of alleged overpayments previously made by the United States on certain designated transportation bills submitted by the respondent for the transportation of goods in 1944 (R. 5). The answer set forth as the grounds for the petitioner's determination of overpayment the statement that charges in the 1944 bills had been computed on the basis of the size of the freight car furnished and used and not on the basis of the size of the car ordered by the United States (R. 5). The petitioner further alleged in its answer that the respondent at no time furnished the Government with facts respecting its failure to supply cars of the size ordered (R. 5). To this pleading the respondent filed a reply admitting the receipt of the check in the amount of $117.77 but denying that it had overcharged the United States with respect to the four shipments in 1944 (R. 5-6). The respondent further alleged that the "defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 was in full force and effect and applicable thereto," and that "the plaintiff . . . fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation" (R. 6).

In 1942, as a wartime measure to effect economies in the use of railroad cars, the Interstate Commerce Commission

issued Service Order No. 68, which suspended the provisions of section 6(a) of Rule 34 of the rules of the Interstate Commerce Commission. In pertinent part this latter rule specified that, if a carrier was unable to furnish a car of the length ordered and therefore substituted a longer car, it could legally charge the shipper only on the basis of the size of the car ordered. With the suspension effected by Service Order 68 the carrier could thereafter legally make charges for the size of the car furnished in those instances where it was unable to supply a car of the length ordered.

With respect to the 1944 shipments it appears that the initial carrier had furnished on each occasion a car of greater length than that ordered, and subsequently the respondent, as the terminal carrier, had presented bills to the Government at the rate applicable to cars of the size furnished (R. 21, 22, 24, 25, 26). Pursuant to section 322 of the Transportation Act of 1940 these bills were paid (R. 21, 23, 24, 25, 27). Some six years later, however, the bills were post-audited by the General Accounting Office and, without undertaking to determine the important extrinsic fact necessary to establish that there had, in fact, been an overcharge in 1944, namely, whether the initial carrier was able to supply freight cars of the smaller sizes ordered, the General Accounting Office made a deduction from a bill submitted by the respondent in June, 1951 (covering charges on the 1950 transportation sued upon), in the amount of the difference between the charges for the cars ordered and those furnished (R. 22, 23, 25, 26, 27).

On these facts and the state of the pleadings before it, the District Court ruled that, in order for the plaintiff to recover, it need allege nothing beyond the facts of the particular 1950 shipment set forth in the complaint, the bill for which transportation the United States had refused to pay (R. 33). The Court reasoned that, since the plain-

tiff had brought suit upon a particular contract of transportation, other contracts claimed by way of setoff or otherwise would have to be set up in the defendant's answer and proved by the defendant (R. 39-40).

Thereafter the Railroad filed a motion for summary judgment with affidavit attached demanding judgment in the sum of $402.84,[1] and the United States moved for judgment in its favor on the ground that the Railroad had "failed to plead facts entitling it to recover herein" (R. 34-36). On November 23, 1955, the District Court entered judgment for the Railroad in the reduced amount of $402.84 and at the same time denied the petitioner's motion for judgment (R. 37-38). The Court of Appeals affirmed (R. 39-47).

In its opinion the Court of Appeals rejects the construction of section 322 urged upon it by the petitioner to the effect that, when a deduction is made by the Government upon post-audit against an amount due the carrier on another transaction, then in order for the carrier to recover the amount admittedly due on the subsequent transaction it would have the burden of alleging and establishing that there was no overpayment in the prior transaction used by the Government by way of setoff. The Court found "no language in § 322 justifying this extraordinary result" (R. 44). The Court reasoned that this would upset the established order of things; and that, if the intent of Congress had been to accomplish such result, it certainly would have used appropriate language to that end. In the Court's view "All that § 322 does is to authorize and direct disbursing officers of the United States to pay transportation bills upon presentation, without waiting for audit or settlement by the General Accounting Office. This the

[1] The reduction in the respondent's demand for judgment resulted from administrative negotiations wherein the parties agreed that the Government should be allowed a credit of $622.42 (R. 36).

United States might choose to do, just as a private shipper might pay the bills rendered by a carrier without making an audit" (R. 44).

Summary of Argument.

I.

A. Respondent in the case at bar brought suit in contract to recover for transportation services rendered in 1950. It alleged in its complaint all essential facts entitling it to relief, including the performance of the transportation services, the correctness of the charges therefor, proper demand and refusal of demand. But the petitioner, in effect, has taken the position that before respondent may recover in the case at bar it has to sustain the additional burden of proving that the Government had not made overpayments on prior unrelated contracts interposed by the Government by way of setoff.

It is manifest that such an unusual contention runs directly counter to judicial rules of proper pleading and proof and can find no support in precedent whatsoever. Petitioner argues, however, that, because it had to pay the carrier's bills for the earlier transportation contracts upon presentation under section 322, the Court must view the litigation as if the carrier were really suing on the original transaction, which served as a basis for an administrative deduction by the Government under section 322. An acceptance of petitioner's view would require this Court to ignore the allegations of the complaint and look to the defendant rather than the plaintiff as the party who shapes the issues to be tried. In addition, the petitioner would be denied a right to elect as to which facts or transactions it preferred to declare upon, *i.e.*, the bill for subsequent transportation services or the earlier bill. Such results are

clearly contrary to legal principles and can find no justification in section 322 either by express language or by necessary implication. There is nothing in that law which requires a holding that, when a carrier, such as respondent here, sues upon a simple contract for transportation services setting forth in its complaint a claim clearly showing that it is entitled to relief, which the Government concedes, the carrier may not recover, just because the Government in its answer has made references to certain prior transportation bills with the mere assertion, unbacked by any proof, that it overpaid the carrier on its bills.

B. Section 322 in no sense adds to the burdens of a common carrier in a suit to recover transportation charges. The provision allowing the Government to deduct the amount of any overpayment to a carrier from subsequent bills did not create a new right but was a statutory reflection of a right already existing at common law. *Gratiot* v. *United States*, 15 Pet. 336, 370 (1841). Section 322 specifies nothing in regard to burdens of proof, burdens of evidence or burdens of going forward and must be construed as leaving intact ordinary rules of evidence and other principles of judicial procedure. Nothing in the background of that Act or the problems which it was designed to meet shows that section 322 was intended to assume the proportions of giving an administrative determination finality, or of placing any greater onus upon a carrier to sustain its claim for transportation services than existed prior to the enactment of that section. *Seaboard Surety Co.* v. *United States* (1946, Ct. Cls.), 67 F. Supp. 969.

II.

A. Petitioner here occupies the position of a counterclaimant and according to established legal principles it has the same burden of proving the validity of its counter-

claim as any other claimant. *Co-efficient Foundation, Inc.*, v. *Woods* (1948, 5 Cir.), 171 F. 2d 691, 694. Since it is seeking to set off against an admittedly valid claim a claim which it asserts arises out of another transaction, the petitioner has the burden of persuading the Court as to the validity of its offset. *Atlantic Coast Line Railroad Co.* v. *United States*, 140 F. Supp. 569. No exception to these principles can be invoked in favor of the United States. *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 94 F. Supp. 677. *Allis-Chalmers Manufacturing Co.* v. *United States*, 79 Ct. Cls. 453, 462. There is no language in section 322 to indicate that its provisions were intended to change this established order in regard to carriers' claims for transportation services. If that had been the intent of Congress, it would have so specified in plain language, which it did not. Nor can any reading of the deduction provision in section 322 lead to the result that an exercise of the right to deduct places the Government in the favorable position of requiring the carrier to disprove the validity of the offset when it sues to recover charges for later transportation services. Since, as we have seen, the deduction provision was but a statutory reflection of a pre-existing right in the Government, the question whether a deduction was proper still remains a question to be adjudicated when raised in judicial proceedings. *Illinois Surety Co.* v. *United States*, 240 U.S. 214. Thus the Court of Appeals clearly held the Government in the instant litigation to the same burdens and requirements as any other counterclaimant. The recent decision of this Court in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, does not require a contrary holding. The Court there was not concerned with what, if any, impact section 322 had upon rules of evidence and proper procedure such as those mentioned above. Its reference to section 322 was for the sole purpose of showing that the Government need not

bring anticipatory suits for reparation in order to raise the issue of unreasonableness of a tariff but under section 322 it may make an administrative deduction and save such issues for such time as later judicial proceedings are initiated.

B. The Government has not made out a prima facie case. The Court of Appeals found that this was not a proper case either for the creation of a presumption as to availability of cars of the size ordered or for application of the rule of evidence that the burden is upon a party to establish those facts which are peculiarly within its knowledge. Presumptions and rules of evidence like those in question are, in the final analysis, grounded upon considerations of fairness and experience. In the absence of Congress specifying anything on the subject, the Court of Appeals held that reasons of fairness and experience did not require it to create a presumption as to availability of cars in the case before it. In the present case the Court of Appeals found that it would be manifestly unfair to let judgment go against the respondent on this issue alone since the Government had put off post-auditing of these bills for fully six years after the charges were initially paid.

In addition, the history of Service Order 68 and the repeated efforts of at least one branch of the Government to have it repealed show, contrary to petitioner's assertion, that the facts as to availability of freight cars were by no means peculiarly within the knowledge of carriers but were equally accessible to the Government.

Argument.

The opinion of the Court of Appeals for the First Circuit bespeaks the care and consideration expended to protect against unauthorized encroachment those legal prin-

ciples so fundamental in our body of law, including a plaintiff's right to choose the forum; to shape the issues; and to demand proof of a setoff or counterclaim.

Petitioner here would have all that changed whenever the United States is a counterclaimant against a railroad carrier; and its only hope for such preferential treatment lies in section 322 of the Transportation Act of 1940.

The Court of Appeals held that section 322 had no such property.

After an exhaustive treatment of all facets of petitioner's claim, including an obiter consideration and the resulting rejection of a theory of rebuttable presumption, the Court concluded that the only course open to it was to affirm the judgment of the District Court; which it did.

The following argument shows the character of this simple action on a contract; and a brief demonstration of the impact of section 322. In our second point we show that the Government is like any other counterclaimant; and we add a complete refutation of petitioner's claim of prima facie case on its counterclaim.

I.

Section 322 of the Transportation Act of 1940 does Not Place upon a Carrier-Plaintiff the Burden of Setting Forth in its Complaint Anything with Respect to Prior Transportation Contracts between the Parties; or of Making Any Showing that on an Overall Basis the Government-Defendant has Not Overpaid the Carrier Thereon.

A. This Action is a Simple Suit on a Contract to Recover Sums Due for Transportation Services Performed in 1950.

This litigation was commenced by the respondent as a suit on a contract entered into between the respondent Railroad

and the Government for the performance of certain transportation services by the former in the year 1950. The Railroad duly performed and submitted a bill for its services which the Government refused to pay in full. After the usual exchange of administrative views and opinions, the matter became stalemate. At this point respondent had but one alternative: it could give in to the petitioner or it could bring the matter before a third party with power to decide the issue. Petitioner, although a sovereign, had ceded the right to be sued. Respondent did so by filing a complaint in the United States District Court for the District of Massachusetts alleging performance of the contract of transportation, the lawful charges assessable therefor under applicable tariffs, demand upon the petitioner for payment of these charges and refusal of demand; all of which the Government in its substitute answer admitted. Contrary to the contention of the petitioner, it is not pertinent to this case that the respondent's suit could have been brought in the Court of Claims. Apparently, petitioner prefers the procedural rules of that Court. In its brief, at page 48, petitioner sets out verbatim a Memorandum Order as to Procedure issued by the Court of Claims. If the respondent had elected to sue in that Court, it would have complied with all of the procedural rules thereof. However, the fact is that the suit was not brought in the Court of Claims, and therefore the procedural rules of that Court are not applicable to this case.

The complaint and the admissions in the Government's answer clearly demonstrated that the respondent had a valid claim entitling it to relief, which should be granted unless the Government could defeat recovery by setting forth other matters in its possession by way of defense or counterclaim. This the Government attempted to do by referring in its substitute answer to certain alleged overpayments made by the Government on designated transporta-

tion bills submitted by respondent to the Government in 1944; and claiming a setoff under section 322 of the Transportation Act of 1940. On this state of the pleadings and evidence the Government contended in the District Court that respondent was not entitled to recover, despite the admissions made by the Government, unless the respondent made a showing that the Government had not made overpayments on the prior bills referred to in petitioner's substitute answer.

There was thus presented for the Court's determination a simple issue which this respondent submits is basic to this entire litigation; that is, an issue of proper pleading and proof.

The District Court rejected the Government's contention, ruling "as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plaintiff" (R. 33-34).

The respondent takes pains to emphasize the beginnings of this case and the proceedings while it was before the Court of first impression in order to bring into clear focus what it maintains is now and has always been the petitioner's chief contention in the instant litigation: the Government says that, in order for a claimant to prevail in a simple action of contract, it must not only plead and prove its own claim, but, in addition, must disprove any claim of its opponent interposed by way of counterclaim or setoff. An acceptance of this proposition as applicable to the facts of this case would subvert and render nugatory orderly rules of pleading and practice founded in logic and common sense and long accepted and adhered to by courts of law. Presumably, petitioner finds justification for such a departure from the established order by reliance upon another

principle which it apparently claims to be all-embracing, namely, that claimants against the Government have been traditionally required to establish the validity of their claims. However, granting the correctness of this proposition, it does not appear that its invocation here is helpful since, as respondent has demonstrated, its "claim" in this litigation is for transportation charges earned in 1950 by virtue of delivery of a carload of household effects to the petitioner at Newport, Rhode Island. The "validity" of the claim depends upon the contract and the applicable tariffs, both of which the petitioner admits in paragraphs 2 and 3 of its substitute answer (R. 4, 5). Thus, as a claimant against the Government in this case, the respondent has "established" the validity of its claim. In addition, as we shall demonstrate later, there is another principle, equally valid, which specifies that, when the Government in turn assumes the position of a counterclaimant, it has to establish the validity of its counterclaim.

But petitioner argues that, looking to realities, respondent in this proceeding is seeking to recover funds recouped from it on account of 1944 transportation services and as to its entitlement to such funds the respondent has the burden of proof. The respondent submits that the realities of the situation are that when it submitted its bill for transportation services rendered in 1950 the Government made only a part payment thereon and refused to pay the balance. The further realities are that, when respondent thereafter brought suit to recover the balance not paid, the Government did not set forth the grounds for its setoff nor did it justify the same in accordance with judicially accepted principles and procedures applicable to all litigants alike, including the United States Government.

According to the construction urged upon this Honorable Court by the petitioner, with the enactment of section 322 of the Transportation Act of 1940 a plaintiff must there-

after, in every case, sue on the original transaction to recover an administrative deduction, or at least in those instances where it failed to do so the Court must entirely disregard the declaration and pleadings as drawn and require the claimant to proceed as if it had sued on the original transaction. Thus, if petitioner's interpretation is accepted, claimants are stripped of any right of election to sue on the bill from which the deduction is made [2] and any complaint in which they attempt to do so is, according to petitioner, "artfully elliptical."

Petitioner does not and cannot point to any specific language in section 322 which would take away from a claimant his right to choose, from amongst methods of proceeding, that particular course which the claimant feels on the overall will be most likely to assure a successful outcome. In other contexts, as this Court well knows, the plaintiff as the party bringing suit undoubtedly has a certain advantage which accrues from the fact that it is the party who first frames the issues as the basis for litigation in its complaint. While under the modern practice contemplated by the Federal Rules of Civil Procedure the function of the complaint has sometimes been held to be primarily that of notice-giving, the respondent submits that it also has the additional function of shaping the issues to be tried. *Emery* v. *Chicago, Burlington & Quincy Railroad Co.*, 119 F. Supp. 654. *The Creek*, 8 F.R.D. 118.

In *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 33 S. Ct. 410, 57 L. Ed. 716, where the question for decision was whether the Court had jurisdiction to hear the case under the patent or other laws of the United States, Mr. Justice Holmes, speaking for the Court, said at page 25:

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[2] It appears that a claimant had the right prior to enactment of section 322 to make an election between a suit on the deduction or on the subsequent bill due to existence of the Government's common-law right of setoff.

"Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defence even when anticipated and replied to in the bill."

Respondent Railroad submits that it is no less master to decide whether to bring suit upon its 1950 transportation bill, as it has done here, or whether to sue to recover the deduction. It was master to so decide prior to the enactment of section 322 of the Transportation Act of 1940 and continued to be master to decide thereafter unless Congress expressly provided otherwise in that Act. This Congress did not do.

Contrary to the history of legal principles, the petitioner urges that section 322 must be read as showing an intention of Congress that claimants subject to the procedure arising out of section 322 may never bring suit upon the transportation bill from which a deduction has been made, since otherwise the results illustrated by petitioner in its brief and therein characterized as "anomalous" would occur. The respondent does not deny that a claimant's election to proceed along one or more different avenues open to it might be decisive as to various incidents of the litigation, such as the proper allocation of burden of proof. However, respondent contends that this has always been the case, not only in litigation involving suits against the United States on claims from which amounts have been offset by the Government, but in other types of litigation as well. If the possibility that results will differ in given cases, depending upon which operative-facts claimant chooses to declare upon, might be described as anomalous, then respondent believes that such anomalies (attributed by petitioner to the Court of Appeals' interpretation of section 322) must

in the last analysis be balanced against the more drastic results which would follow from petitioner's interpretation of section 322, *i.e.*, that a claimant may no longer make an election as to which facts or transactions he will sue upon, that the complaint may not be looked to as formulating the issues to be tried, that a claimant who sets forth a claim clearly showing that it is entitled to relief may not recover unless it also demonstrates the falsity of its opponent's counterclaim, that one who sets up a counterclaim need not carry the burden of proving its validity, etc. When these various factors are properly weighed and accorded their relative importance, the anomalies depicted by petitioner lose much of their power to terrify and the strained interpretation of section 322 urged by petitioner to eliminate the specter emerges as the only real horror. Respondent, on the other hand, contends that, if section 322 is to have an effective operation as a procedure provided by Congress to take effect primarily on the administrative level, it must not be allowed to interfere with fundamental rules of evidence and judicial practice when a controversy has been removed from the stage of administrative handling and transferred to a court of law.

With a view to convincing the Court that the litigation instituted by respondent is not a simple suit on a contract for 1950 transportation services, but really a suit by respondent on 1944 transportation, petitioner reminds this Court that it has on previous occasions "looked through form to substance in delineating the issue when an action is brought following an administrative deduction from an undisputed claim." In support of its position the petitioner cites the cases of *Reynolds* v. *United States*, 292 U.S. 443, and *Alcoa Steamship Co., Inc.*, v. *United States*, 338 U.S. 421, in the body of its Brief and refers in a footnote to *United States* v. *Chesapeake & Ohio Railway Co.*, 352 U.S. 77. From a reading of these cases it is not apparent, as

petitioner contends in its Brief, that the claimants therein brought suit on the conceded claim, but, to the contrary, it appears that they sued directly to recover the amount deducted. This difference alone would explain why the Court in the *Alcoa* and *Chesapeake* cases treated as the issue to be decided questions arising from the earlier transaction. But even if suit had been on the conceded claim, this Court's focusing on the earlier transaction as presenting the issue to be decided is not inconsistent with respondent's position here, since it appears that the parties themselves had joined issue on that point by their pleadings and contentions. That was not the case in the instant litigation. In the District Court the Government by its pleadings and contentions had raised quite another issue. As that Court stated, "The issue which is just at the moment raised is whether the plaintiff must show anything except the liability of the government with respect to this alleged contractual obligation" (R. 31). It does not appear that in any of the cited cases issues were raised and dealt with by the Court as to principles of practice and rules of evidence such as the proper allocation of burden of proof as between a claimant and a counterclaimant, issues which are dispositive of the case at bar. The *Reynolds* case, cited by petitioner, is not authority for the proposition that this Court may disregard the allegations of a party's complaint which clearly state a claim for relief and consider the litigation as if plaintiff were actually declaring upon other contracts between the parties, interposed by the defendant for the first time by way of setoff or counterclaim. In that case the petitioner brought suit in the Court of Claims against the United States for money *deducted* from his pension on account of board furnished while an inmate of a Government hospital. Actually, contrary to petitioner's contention, the case cannot stand for the proposition that the Court "looks through" form to

substance, because there was no "form" to look through. This Court said of the Court of Claims reference to the prerogative of the Director of the Veterans Bureau to make certain determinations (at page 446): "Granting the correctness of this view, we are of the opinion that it does not apply in this case." Above all, in that case the Court did not ignore the allegations of the complaint or regard the action as something different from what it was.

In sum, the respondent submits that, despite the attempts by the Government to cloud the essential facts, the case at bar is a simple suit in contract to recover for transportation services performed in 1950.

B. Section 322 Added No Burden to Respondent Here.

There is nothing born out of section 322 of the Transportation Act of 1940 that adds to the burdens of respondent in this action; or that relieves the burdens of petitioner.

Section 322 was promulgated as a wartime exigency to stabilize the economy. At that time the Government was the railroad carriers' most extensive user. Practically all of the railroads' revenue was represented by Government accounts receivable. The situation had ominous forebodings for the railroads as early as 1937. It was obvious that the key to the log-jam was the custom of the Government to defer all payments for transportation charges until an audit of each charge by the Government Accounting Office could be had. Possibly the railroads could have relied upon their legal right to refuse delivery at destination until the transportation charges were paid, as it could do in the case of the ordinary shipper. However, the solution, to be effective, had to get money flowing into the railroads so they in turn could pay their employes and their credi-

tors and so on into the financial blood stream of the national economy. The problem to be solved was a national problem; and the answer had to be national, not just a panacea of railroad ills.

Throughout the legislative history of that Act nothing was said or done from which the inference could be made that either the Government or the railroads thought or intended to sponsor the enactment of judicial rules of procedure. Nothing therein indicates any intent to create any impact upon burdens of proof, burdens of evidence or burdens of going forward.

Section 322 solved the problem of the financial plight of the railroads and other common carriers. By law, the Government was thereafter authorized and directed to pay for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier "upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, . . ." However, except for the elimination of the pre-audit procedure of payment by the Government, section 322 added nothing new to the common carrier-shipper relationship. It did provide a statutory reflection of the right of the Government to set off overpayments. The section concludes with the words: ". . . but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." But that was not the creation of a new right. As the Court of Appeals below expressed it: "We suppose that this provision was inserted out of an abundance of caution, because the availability of a setoff by the United States need not depend upon specific statutory authorization" (R. 45). The Court cited *Gratiot* v. *United States*, 15 Pet. 336, 370 (1841), wherein Mr. Justice Story held for the Court:

> "The United States possesses the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him."[3]

In addition to the unwarranted assumption that section 322 created a new right of setoff in the Government, the petitioner accords a strange construction to the phrase "the amount of any overpayment" as it appears therein. Petitioner urges that the mere unilateral assertion by some accounting officer that an overpayment exists is a "finding" of an amount due. The Court of Appeals rejected that reasoning in pointing out that whether an overpayment existed or not depended upon the establishment of an extrinsic fact which the record indicates the petitioner did not undertake to determine.

> "This means that, before the claimed setoff must be accepted in a judicial proceeding, the existence of such overpayment must be objectively determined, in fact and in law; it is not enough merely that some accounting officer has unilaterally asserted the existence of such overpayment." (R. 45.)

This disposition on the part of petitioner to insist upon a prerogative in the Government to determine with finality

[3] See also *Wisconsin Central Railroad Co.* v. *United States* (1896), 164 U.S. 190, 206-210.

what is and what is not an overpayment is difficult to understand in contemplation of the practical mechanics of a post audit setoff under section 322. It must be remembered that the assessment of charges by the railroads and the appraisal of those charges by the Government are activities assigned to the extreme skills of experienced personnel by each party. Neither side rejects the administrative opinion of the other simply because it wants to have the last word. Each side has sound reasons for holding its position. In the vast majority of instances the experts on both sides agree as to the proper rate or classification and the controversy is resolved by administrative adjustment. Thus it seems both unreasonable and unjust to force acceptance of the Government's view where there is honest disagreement between the parties. The right of offset does not give the Government a superior legal or equitable claim to the funds in its hands, nor does such right of offset give the administrative settlement finality. *Seaboard Surety Co.* v. *United States* (1946, Ct. Cls.), 67 F. Supp. 969, 971. Ordinarily submission to arbitration would be the solution, but there is no provision for arbitration in these cases. That leaves open only one course: judicial determination.

Judicial determination is open to either the Government or the carrier. But as a practical matter the Government does not have to resort to initiating legal action in most cases, because it always owes the railroads for transportation charges and thus can exercise its "common right, which belongs to every creditor." [4] The same privilege is available to the railroads in any case where they are claiming an undercharge to the Government and they have funds due the Government in their possession. It is easily understood, however, that the shoe is seldom on that foot. So, in

[4] *Gratiot* v. *United States, supra.*

the usual pattern, the railroad has to seek outside help to get an enforceable determination as to whether or not there was an overpayment by the Government; and, as mentioned above, recourse is had of the courts. Whenever a railroad brings an action against the Government, directly upon the deduction, it has the burden of alleging and proving the facts of the case and establishing the validity of its claim in the light of the contract and the applicable tariffs. For example, if in the case at bar the respondent had sued to recover the alleged 1944 "overpayment," it would have the duty of proving the correctness of its 1944 bill. And that duty would embrace adherence to all pertinent rules of procedure, including burdens of proof and of evidence.

But to hold that section 322 provides that in every case and under every circumstance the burden of proving either the correctness of its own contentions as to applicable tariffs or the incorrectness of the Government's contentions thereon is on the carrier is to give to simple, ordinary words a meaning unrecognized in common usage.

Neither legislative history nor the letter of Mr. Pelley[5] urges or indicates a necessity or desire for the enactment of changes in legal principles and practices of proof. If such is made mandatory by the inability of the petitioner here to meet the requirements of present legal standards applicable to counterclaimants, a resort to the Congress can be had.

In its present posture section 322 adds no new burden to a plaintiff facing the Government as a counterclaimant.

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[5] Mr. J. J. Pelley, as president of the Association of American Railroads, addressed a letter, under date of October 5, 1937, to Captain H. E. Collins, Assistant Director, Procurement Division, Treasury Department, urging that something be done to enable the railroads to get their transportation charges paid within a reasonable time.

II.

SECTION 322 OF THE TRANSPORTATION ACT DOES NOT ALLOW THE GOVERNMENT, AS A COUNTERCLAIMANT, TO RECOVER IN SETOFF ON THE BASIS OF AN ALLEGED OVERPAYMENT WITHOUT SUSTAINING THE BURDEN OF PROVING SUCH OVERPAYMENT.

A. The Government must Sustain Same Burdens As Any Other Counterclaimant.

A cursory examination of the pleadings in the instant litigation shows that the position of the United States in this case is essentially that of a counterclaimant seeking to set off against funds due for 1950 transportation services other sums which it claims are owing to it on account of alleged overpayments made earlier. Thus, by its answer, the Government said (R. 4, 5) that it did not owe respondent carrier the amount claimed for the service of transporting household effects in 1950, because respondent carrier owed the Government money arising from previous unrelated contracts. Because that claim of the Government had nothing whatsoever to do with the claim on which the case at bar is based, the only means of setoff on the part of the Government is in the nature of a permissive counterclaim under Federal Rules of Civil Procedure, Rule 13(b), 28 U.S.C. *Fraser* v. *Astra Steamship Corp.* (1955, N.Y.), 18 F.R.D. 240, 242.

It is an elemental rule of evidence that he who sets up a counterclaim has the same burden of proving its validity as any other claimant. *Co-efficient Foundation* v. *Woods* (1948, 5 Cir.), 171 F. 2d 691, 694; rehearing denied, January 10, 1949. *Bethlehem Steel Co.* v. *United States*, 75 Ct. Cls. 845. *Heid Bros., Inc.*, v. *United States*, 65 Ct. Cls. 87. In *Allis-Chalmers Manufacturing Co.* v. *United States*, 79 Ct. Cls. 453, 462, the Court of Claims recognized this principle.

stating: "The burden is on the defendant to establish its counterclaim and the rule is well settled that the same character of proof is required to establish a counterclaim as to sustain any other claim." The Courts have held that no exception to this rule may be invoked in favor of the United States, but that it must sustain the same burdens as any private suitor when it assumes the position of counterclaimant. *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 94 F. Supp. 677, 679. *Allis-Chalmers Manufacturing Co.* v. *United States, supra.*[6]

Thus it is seen that, prior to the enactment of section 322, whenever the Government sought relief by way of counterclaim, no matter what the nature of the litigation, it had to plead and prove the same. With the passage of section 322, however, according to petitioner, that was no longer to be the case in regard to litigation between the Government and carriers involving transportation charges, but carriers must, in every case, carry the burden of disproving the Government's setoff or counterclaim. Petitioner is not fazed by the fact that, in order to sustain its interpretation of section 322, this Court would have to find that the Congress which enacted that section also intended to work a fundamental change in the long-established judicial principles mentioned above, without even so much as alluding to them. Recognizing that this would be an extraordinary result for which there is no justification in the language of section 322, the Court of Appeals rejected petitioner's construction and held it to the very same burdens and requirements as any other counterclaimant in the suit before

[6] The holdings in these decisions were foreshadowed in *United States* v. *Norwegian Barque "Thekla"* (1924), 266 U.S. 328, where Mr. Justice Holmes speaking for the Court, said: "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

it. In doing so the Court of Appeals agreed with *Atlantic Coast Line Railroad Co.* v. *United States*, 140 F. Supp. 569, quoting with approval the following statement appearing at page 572 of the Court of Claims decision:

> "Since the Government is seeking to set off against an admittedly valid claim, a claim which it asserts arises out of another transaction, it has the burden of persuading us as to the validity of its offset."

The Court of Appeals gave a practical, commonsense construction to section 322, holding that its effect in a case like that at bar was to bring the United States into closer parity to a private shipper.[7]

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[7] In two footnotes of its Brief the Government takes issue with the Court of Appeals' conclusion that "the position of the United States as shipper, so far as the present case is concerned, is no different from that of a private shipper" (R. 43). That Court had expressed the opinion that, under section 3(2) of the Interstate Commerce Act (49 U.S.C. 3(2)), carriers were not required by law to relinquish possession of a shipment to the United States at destination prior to payment (R. 43). The Government, in footnote 8 of its Brief, makes the bald assertion that "By its terms, Section 3(2) is inapplicable to transportation services furnished to governmental units." A reading of section 3(2) itself shows that this statement by the Government is incorrect. It is true that section 3(2) does make a distinction between the United States and other shippers but only to the extent of providing that "the provisions of this paragraph shall not be construed to prohibit any carrier . . . from extending credit in connection with rates and charges on freight transported for the United States . . ." Although a carrier may treat the United States and private shippers differently under section 3(2) insofar as the extension of credit is concerned, there is nothing in that section which requires carriers to extend credit to the United States and thus prevents them from treating the Government and private shippers alike in this respect as in others. Again the Government in its Brief attempts to refute the Court of Appeals on this point by stating in footnote 21 that "The private shipper, who is re-

The respondent submits that the only confusion present in this case is due to petitioner's failing to relegate to its proper field of activity the procedure comprehended by section 322. That section concerns itself wholly with the payment policy provided for the Government by Congress regarding transportation charges. It was directed to the administrative practice of payment and settlement of accounts between carrier and the Government. That is, it conferred upon the agents of the United States authority to make payment upon presentation, substituting a post-audit for a pre-audit and, in addition, confirmed the pre-existing right of the Government to deduct any amount of administratively determined overpayments from subse-

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quired by section 3(2) of the Interstate Commerce Act, 49 U.S.C. 3(2), to pay freight charges promptly, cannot set off an overpayment against the charges for other transportation services rendered to it." The Government then goes on to reason that, since Congress has expressly included in section 322 this right of setoff on the part of the Government the Court of Appeals was in error when it likened the position of the United States as shipper to that of private shippers. The difficulty with this reasoning again is that the initial statement made by the Government is clearly erroneous. A private carrier may be in the same position as the United States to set off a claimed overpayment against charges for other transportation services. A proper reading of section 3(2) shows that both a private shipper and the United States may obtain credit for transportation services rendered; in the case of the United States by negotiation between the parties; in the case of a private shipper under "rules and regulations" prescribed by the Commission "to govern the settlement of all such rates and charges and to prevent unjust discrimination." See, in this respect, *Ex parte No. 73*, 57 I.C.C. 591, and Interstate Commerce Commission's "Order of 4th day of June, A.D. 1920," allowing carriers to extend credit for a period of ninety-six hours to shippers under prescribed conditions and limitations. Under the extension of credit thus made possible, a private shipper, by relying upon its common-law right of setoff, may set off earlier overcharges against subsequent freight bills. Thus there is no such disparity between the United States and a private shipper as contended for by petitioner.

quent transportation bills. There is nothing to indicate, however, that this section was intended to have a further effect once a dispute as to proper charges had been transferred from the stage of administrative handling to a judicial proceeding. It is thus important to keep in sight two separate levels or stages in which a carrier's claim for transportation services might be involved, *i.e.*, an administrative stage and a judicial stage. Undoubtedly the Government's payment policy will have certain collateral effects, including an impact upon later judicial proceedings. As the Court of Appeals pointed out (R. 45), the fact of payment or withholding of payment may influence subsequent litigation to the extent of determining which party shall carry the burden of proof and the burden of allegation. This is so because rules of evidence do not operate in a vacuum but take effect within the context of the actions of the parties. However, granting this connection and interaction between the Government's payment policy and subsequent judicial proceedings, it does not follow that a law whose only manifest purpose was to alter that payment policy must also be held to have the further effect of changing customary rules of procedure and practice adopted by courts of law. If that were the intent of Congress, it would have so specified in plain language. Yet petitioner reads the deduction provision of section 322 as accomplishing that result. According to its construction the reservation of a right to deduct the amount of any overpayment is tantamount to the conferral by Congress of a right upon the United States to require carriers to be put to the burden of disproving the propriety of a deduction. As we have previously mentioned, the right to setoff on the part of the Government is not new, and it was not created originally by the Transportation Act of 1940. The actual wording of the deduction provision indicates that the Congress which enacted section 322 was cognizant of that fact, since, in

dealing with the Government's right to deduct, it made use of the word "reserved," which indicates a confirmation of that which was already in existence, rather than another word, such as, "conferred," which would tend to show an intent to give something for the first time. But, in so confirming a pre-existing right, Congress, in no sense, added a new force or effect to such right.

The Court of Appeals interpreted the deduction provision in this light, refusing to lend to it any new function or operation attributed to its inclusion in section 322 by petitioner. By language quoted earlier in this Brief, that Court held, in effect, that whether or not an overpayment actually existed was a question to be decided by a court of law when the propriety of a deduction was brought into question in judicial proceedings. In so treating the deduction provision within the context of section 322 the Court of Appeals followed earlier authority dealing with the operative effect of the exact same right as it existed at common law. Thus, in the case of *Illinois Surety Co.* v. *United States*, 240 U.S. 214, this Court, in considering the Government's common law right of setoff, said: "Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated as properly raised in judicial proceedings, . . ."[8] See also *Seaboard Surety Co.* v. *United States*, 67 F. Supp. 969, 971, *supra*.

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[8] This language of the Court in the *Illinois Surety Co.* case lends more support to respondent's view of *Grand Trunk Western Railway Co.* v. *United States*, 252 U.S. 112, 121, than to that of petitioner. In the latter case it was held that, where the Government had deducted from a current bill the amount of certain prior overpayments made for the transportation of mail, the United States "was under no obligation to establish the illegality [of the prior overpayment] by suit." Petitioner cites this case as standing for the proposition that, in a case involving a deduction from a current bill, the Government is relieved of the obligation to establish the correctness of the deduction when it asserts it as a counterclaim

The petitioner cites the recent decision of this Court in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, as support for its interpretation of section 322. That case involved three suits under the Tucker Act: to recover certain deductions made by the Government on account of alleged overpayments made to respondents Bangor and Seaboard; and to correct an underpayment to Western Pacific. In that case this Court was faced with three issues: (1) the application of the doctrine of primary jurisdiction; (2) the application of the two-year period of limitation contained in section 16(3) of the Interstate Commerce Act; and (3) the dismissal of the Government's claim of estoppel as to respondents Bangor and Seaboard. This Court did not have before it the question of the effect of section 322 in adding to the burdens of a carrier-plaintiff or the effect of section 322 as relieving the burdens of the Government as a counterclaimant.

The petitioner urges that the language of this Court in deciding the inapplicability of the two-year period of limitations simultaneously stands for the proposition that an acceptance of a pre-audit payment by a rail carrier is conditional upon the later determination by the Government

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in a suit brought by the carrier for transportation charges. Thus the petitioner would have us believe that the Court in the *Grand Trunk* case meant that the United States did not at any time have to establish the fact of overpayment in any judicial proceeding and no matter under what circumstances the question of overpayment arose; whereas the respondent says that the true construction of that holding is that as a first step to the act of making the deduction there is no requirement that the Government institute legal action against the carrier to bring about a determination that in fact there was an overpayment. Stated another way, the Government can make its own determination of overpayment without making any offer of proof as to the basis for such determination, unless and until it asserts such overpayment as setoff in a judicial proceeding. At such time it must meet the requirements of such proceeding.

of overpayment being a finality. Respondent here is not in disagreement with the holding of this Court that as to Bangor and Seaboard the Government did not have to file anticipatory suits but, rather, it could deduct under section 322. Likewise, this respondent does not disagree with the statement of this Court in the *Western Pacific* case that it was not the purpose of Congress in enacting section 322 that the utilization of that section by the Government would bar its right to raise issues such as the unreasonableness of a classification or rate. Nothing in the language of this Court in the *Western Pacific* case can be construed as a determination that the Government does not have to pay before audit unless the carrier by voluntary agreement or by operation of section 322 itself accepts as final a later determination by the Government that an overpayment had been made.

As a matter of fact, the *Western Pacific* case strongly supports the position of the respondent here. In that case the Government did exactly what it is contending it does not have to do in this case, namely, offer a proof of its counterclaim. In the *Western Pacific* case the Government claimed its overpayment was the difference between a rate for carriage of napalm gel in the classification as an incendiary bomb as against the classification as a non-incendiary bomb.

In that case the Government did not sit back and claim that Bangor and Seaboard had to prove the Government's contentions. No indeed. Rather, the Government offered its own proof of its counterclaim. The Government said that the overpayment was proved by a ruling of the Official Classification Committee, a railroad tariff agency to which both Bangor and Seaboard belonged, that that type of napalm gel bomb shipment would be carried at a lower rate. As to that evidence of the Government's position, this Court, after review, said: "It appears to be undisputed that the

ruling in question was not rescinded until after all of those shipments had been made." By affidavit the Government had indicated that it was prepared to go further with proof of its counterclaim by showing that it had relied on that ruling to its detriment. It was at this point that the lower Court refused to allow the Government to go forward on the theory of estoppel. It was the satisfactory showing on the part of the Government that it did have facts in support of its counterclaim that caused this Court to rule that the Court of Claims had erred in disposition of the case by summary judgment, and to state that the evidence presented by the Government was sufficient to entitle it to an opportunity to prove reliance and detriment.

Petitioner here does not attempt to explain why the Government accepted its burden of proof as a counterclaimant in the *Western Pacific* case and did not do so in the case at bar. Certainly the fact of existence or non-existence of such proof should not be the controlling factor. In any event, there is no real conflict between the reference by this Court in the *Western Pacific* case to section 322 and the holding by the Court of Appeals in this case as to that section.

B. Contrary to its Contention, Petitioner has Not Made Out a Prima Facie Case on its Counterclaim.

Apparently petitioner concedes the possibility that the holdings of the District Court and of the Court of Appeals herein is the law. Petitioner asserts that it has met its burden of proof on its counterclaim by a showing that the respondent's charges for the 1944 transportation services were incorrect.

The only "showing" by petitioner that appears on the record of this case is the statements by petitioner in answer

to respondent's interrogatories (1) that cars of the sizes ordered were not furnished; (2) that petitioner is without knowledge as to whether a car of the size ordered was available; and (3) that a Reviewer and an Examiner of the Transportation Division, United States General Accounting Office, in the performance of their official duties, "determined" that the amount charged by respondent was an excessive charge.[9] It can be seen that in truth the General Accounting Office made no genuine determination that there had actually been an overpayment. It claimed a credit for the difference between the amounts properly chargeable for the use of the freight cars actually supplied by the initial carrier and the amounts properly chargeable for the freight cars of the sizes requested. But, as the Court of Appeals pointed out, whether or not there was an overcharge depended upon the establishment of an extrinsic fact, namely, whether at the time and place the initial carrier was able to supply freight cars of the sizes ordered. Said the Court: "In other words, the government's so-called post-audit did not undertake to determine the important extrinsic fact necessary to be established in order to sustain the claimed setoff" (R. 45).

The question of whether or not the initial carrier could supply the car of the size ordered involves the applicability

[9] Respondent's interrogatories addressed to the petitioner appear on pages 6 to 20 of the Transcript of Record. Petitioner's answers appear on pages 20 to 28 therein; and petitioner's objections to respondent's interrogatories appear on page 28 of the Record. It will be recalled that the hearing in the District Court was scheduled upon those objections, but that petitioner offered no support of those objections and instead caused the hearing to be cast as a pretrial conference and a submission resulting in the decision of the District Court. In the interrogatories respondent asked a series of eighteen questions concerning each car involved. They appear as questions numbered 7-24, 25-42, 43-60, 61-78 and 79-96, respectively.

of an Interstate Commerce Commission regulation entitled Service Order No. 68.[10] That order was made and entered by the Commission on January 30, 1942, and was effective from February 15, 1942. There were twenty amendments to Service Order 68 during the period it was in force. The order was vacated and set aside by the Commission as of April 16, 1949. The order concerned itself with Rule 34 of Consolidated Freight Classification No. 14; and, more particularly, section 6(a) thereof, which is pertinent here. Section 6(a) of Rule 34 read as follows:

> "If carrier is unable to furnish open car of length ordered and furnishes longer car, minimum weight shall be that fixed for car furnished, except that if articles are of such length as could have been loaded on a car of length ordered, minimum weight shall be that fixed for car ordered."

Rule 34 was a good, work-a-day rule; a rule of convenience. Mainly held to be to the convenience of the railroads, the rule spread its benefits over both the shipper and the carrier. Traditionally held to the requirement of furnishing a car of the size ordered, this Rule 34 gave the railroads the opportunity of greater freedom in filling car orders while, at the same time, it protected the shipper from greater charges where its shipment could have been accommodated on the car it ordered. Rule 34 did not abrogate the shipper's privilege of refusing to accept any car other than that of the length it ordered, but it made such refusal unnecessary as a practical dollars-and-cents matter.

[10] 8 F.R. 8513; amended 8 F.R. 8513; 8 F.R. 14224, 16265; 9 F.R. 7206, 14306; 10 F.R. 6040, 8142, 9720, 12090; 11 F.R. 562, 6983; 12 F.R. 46, 3837, 4719, 4886, 8774; 13 F.R. 3185, 3738, 8220.

Service Order 68 suspended the provisions of section 6(a) of Rule 34. This had been deemed necessary by the Commission as an invaluable adjunct to the war effort because it was the fair and reasonable means of immediately preventing the misuse and the wasteful use of railroad equipment that was causing congestion of traffic. It is to be noted that Service Order 68 was ordained and promulgated by the Interstate Commerce Commission upon its own initiative and at no request of railroad carriers. As was stated by the Commission in one of its holdings:[11]

> "The service order was not issued for the purpose of increasing transportation charges paid by the shippers, nor to augment carriers' revenue, but to increase car loadings, to avoid car shortages and traffic congestion, and to expedite handling of shipments."

There can be no honest dispute of the fact that neither did the Interstate Commerce Commission intend nor did the state of war require any interpretation of Service Order 68 that would place upon railroad carriers more onerous conditions than those imposed upon shippers, including the United States. The question as to whether the railroad carrier in a given case was able to furnish the car ordered was the subject of complaint before the Commission on several occasions. The determinations in those cases indicated that the Commission intended that the successful operation of Service Order 68 had to be a co-operative venture. Both the carrier and the shipper were expected to do whatever was reasonable under the circumstances to guide the course of the application of that Order to insure the accomplishment of its purpose. Typical of those decisions was that in No. 29855, *Simmons Machine Tool Corp.*

[11] *Old Ben Coal Corp.* v. *Chicago, Burlington & Quincy Railroad Co.*, 262 I.C.C. 801 (decided March 19, 1945).

v. *Delaware & Hudson Railroad Corp.*[12] In that case the railroad charged the minimum for the size of the car furnished and used. There was a controversy as to what kind and size of car was actually ordered. The complainant said it had ordered a small, low-side gondola car. The railroad denied that and claimed the request was for a low-side car with no specification as to length or size. The Commission held:

> "It is unnecessary to decide that point, because the applicable tariffs did not permit charges to be collected on the basis of the minimum for the car ordered, but required charges to be collected at the minimum for the car used. Prior to February 15, 1942, certain tariff provisions did permit the carrier to charge on the basis of the car ordered when, for the carriers' own convenience, a larger car than ordered was furnished. But those provisions were suspended pursuant to Service Order 68 of this Commission on that date. The primary purpose of the service order was to eliminate the wasteful use of equipment. That it did not accomplish its purpose in this instance offers no reason for a finding of unlawfulness in the charges imposed. *The complainant could have mitigated its transportation costs by refusing to accept the larger car furnished and by insisting that it be furnished with a small car, such as it allegedly ordered.*" (Italics supplied.)

In the case at bar the petitioner had the same duty to mitigate its transportation costs. If there was the slightest evidence that the respondent was able to supply a car of the size ordered, the petitioner could not just sit back and rely upon some future accounting adjustment to make every-

[12] 270 I.C.C. 521 (decided May 12, 1948).

thing right. It must be remembered that the ones making the decisions as to excessive charges in this case were a Reviewer and an Examiner of the Transportation Division, United States General Accounting Office, "in the performance of their official duties" some five or six years after the transportation services had been performed.[13] Although respondent's interrogatory in each case asked for the basis for such determination, petitioner's answer each time was significantly silent on that point.

Likewise it should be remembered that three of the bills of lading involved here were signed by a Navy officer on behalf of the Inspector of Naval Material, Bureau of Supplies and Accounts, Navy Department, Detroit, Michigan;[14] one by the Resident Inspector of Navy Material, Knoxville, Tennessee;[15] and one on behalf of the Supply Officer, United States Naval Mine Depot, Yorktown, Virginia.[16] All of those were responsible persons in responsible positions. It is inconceivable that they would not have filed some sort of a complaint against the railroad carrier if there had been the slightest inkling that the railroad had been able to supply a car of the size ordered, but had not done so. It is unfortunate that petitioner chose to object to making answer to those interrogatories in each instance wherein respondent asked if any agent of the petitioner was present or available to have been present at the loading of the car furnished.[17] If none had been, it was simply a matter of answering "No."

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[13] See petitioner's answers to interrogatories 21(b), 39(b), 57(b), and 93(b), appearing in Record at pages 21, 23, 24, 26 and 27, respectively.

[14] Answers to interrogatories 8(b), 26(b), 44(b), R. 21, 22, 23.

[15] R. 25, answer 61(b).

[16] R. 26, answer 80(b).

[17] Interrogatories 12(a), (b); 30(a), (b); 48(a), (b); 66(a), (b); and 84(a), (b); see petitioner's objections, R. 28.

As a matter of fact, the petitioner has made no attempt at any showing that any attack by the Government upon Service Order 68 was in any way based upon the ability of the railroad to furnish a car of the size ordered.

There is no question but that the War Department was unhappy about Service Order 68. On October 30, 1943, the Secretary of War filed a Petition for Reconsideration and Modification of Service Order 68. The relief sought was the suspension of the order as it applied to War Department shipments. The railroads filed a reply to the petition; and the Interstate Commerce Commission issued a formal order denying the petition. Those items are set forth in Appendices A, B and C, respectively, in this Brief.

The thrust of the Secretary of War's complaint was the increased cost to the War Department resulting from the operation of Service Order 68. He made no charge that such increased costs were due to the railroad's furnishing a larger car when it was able to furnish a car of the size ordered. The only reference in the petition to the furnishing of cars was this: "In many instances, particularly in the case of open top equipment, the rail carriers are unable to furnish cars of the length required and ordered, and furnish cars which are greater in length than those required and ordered for the transportation of said shipments."[18] If there was any general tendency or even isolated instances of railroads furnishing a larger car than ordered when they were able to do otherwise, what better vehicle for disclosing such a practice than in a petition for suspension of the order? It is fair to say that the petitioner believed that the carrier furnished the car of the size ordered whenever it could.

In any event, the petition of October 30, 1943, shows clearly that the Government had done everything possible

[18] Appendix A, paragraph (4), p. 46, *post*.

to establish a constant source of information on the whole subject of the application of Service Order 68, including the means to know at all times if the railroads were not complying with the requirement of furnishing a car of the size ordered when able to do so. For example: "Petitioner has adopted and put into effect with respect to the transportation of War Department shipments such policies and practices as will insure the most efficient use of railway facilities and equipment, including the maximum loading of railway freight cars, consistent with military requirements." [19] The petition continues to elaborate a detailed and exhaustive routine that could not succeed if the Government did not know at all times whether the railroads were able at a given time to supply a car of the size ordered.

In addition, the petition relates: ". . . the investigation and spot checks which have been made of shipments at its numerous organizations and installations over an extended period of time . . ." [20] Those statements, made in its official petition to the Interstate Commerce Commission, establish conclusively that the Government had access to all the information necessary concerning the ability of the railroads to furnish a car of the size ordered.

The Interstate Commerce Commission denied the Secretary of War's petition of October 30, 1943.[21]

Under date of January 9, 1945, the Secretary of War filed another petition with the Interstate Commerce Commission, seeking again the suspension of Service Order 68 to the extent that it applied to War Department shipments. It was couched in substantially the same language as his 1943 petition, except that it emphasized the theory that, since the provisions of Rule 34 of Consolidated Freight

[19] Appendix A, paragraph (2), p. 44, *post*.

[20] Appendix A, paragraph (6), p. 48, *post*.

[21] Appendix C, p. 53, *post*.

Classification 14 affected only 10% of the available box cars as against 43% of available open-top cars, Service Order 68 was not accomplishing its stated purpose.[22] Before a reply was filed by the railroads or any action was taken by the Commission, the Secretary of War, by letter dated August 24, 1945, requested that the petition be withdrawn; which was done.

Contrary to the contention of the petitioner in this case, the facts determinative of whether the respondent was able to furnish a car of the size ordered are not within respondent's peculiar knowledge. The disclosures in the petitions by the Secretary of War in 1943 and 1945, referred to just above, conclusively establish that.

Interestingly, when petitioner here tries to prove its naked assertion that such facts are within the peculiar knowledge of respondent, it relies, at page 43 of its Brief, upon "uncontroverted statements" in support thereof. Amazingly, the "uncontroverted statements" turn out to be petitioner's answers to respondent's interrogatories. In view of the procedural history of this case, it is difficult to believe that petitioner seriously expects to prove anything by that "pull-yourself-up-by-the-bootstraps" device.

Petitioner appears to be confused in its understanding of the science of legal evidence. A statement does not become proof simply by its utterance. When the petitioner says in its Brief [23] that the burden may not be placed upon a litigant of establishing facts peculiarly within the knowledge of the adverse party, the mere say-so does not prove that the facts of this case give rise to the application of that

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[22] In the records of the Interstate Commerce Commission all items covering Service Order 68 are to be found in two volumes entitled "Car Service—3" and "Car Service—3A." The petitions are in "3A."

[23] P. 45.

principle. Wigmore has written:[24] "Each party wishes to know of what facts he has the risk of non-persuasion. By what considerations is this apportionment determined? Is there any simple rule which will solve all cases and afford a general test for ascertaining the incidents of this risk? By no means." "The burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity, if it is false. But this consideration furnishes no universal working rule. This consideration, after all, merely takes its place among other considerations of fairness and experience as a most important one to be kept in mind in apportioning the burden of proof in a specific case. The trouble is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." "There is, then, no one principle or set of harmonious principles which afford a sure and universal test for the solution of a given class of cases. There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness."

The respondent respectfully submits that, in the case at bar, experience and fairness dictate the complete absence of any peculiar knowledge on the part of respondent of an ability of the railroad carrier to supply a car of the size ordered. Time has not dimmed the common knowledge of the almost miraculous logistical achievement by the Government in the successful prosecution of the defense of this and other nations of the world during the period covered by this case. Indisputably, the Government's well-planned maneuvers in the maximum use of rail carrier facilities and equipment contributed to that success. Never could it have been accomplished unless the Government had known at all

[24] Wigmore on Evidence, section 2486, pages 274, 275 and 278.

times as much or more about the availability of those facilities and equipment than did the railroads.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

EDMUND M. SWEENEY,
Counsel,

ARTHUR D. HEALEY,
Assistant Counsel,

For the Respondent.

Appendix A.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

IN RE: SERVICE ORDER 68.

PETITION FOR RECONSIDERATION
AND MODIFICATION

Now comes the Secretary of War, through his duly authorized counsel, The Judge Advocate General, and respectfully petitions the Commission to reconsider, modify, and set aside Service Order 68, made and entered by the Commission on the 30th day of January 1942 and subsequently amended, to the extent that said order suspends the operation and application of Sections 2 (a) and 6 (a) of Rule 34 of Consolidated Freight Classification No. 14, as amended and reissued, and of similar provisions in any other tariffs or car service rules filed by common carriers by railroad with the Commission, with respect to shipments made by or consigned to any organization or installation of the War Department. The aforementioned sections provide in substance that if a carrier is unable to furnish a car of the length ordered and furnishes a longer car, the minimum weight as to closed cars shall be that fixed for the car ordered, except that when the loading capacity of the car is used, the minimum weight shall be that fixed for the car furnished; and the minimum weight as to open cars shall be that fixed for the car furnished, except that if the articles are of such length that they could have been loaded on a car of the length ordered, the minimum weight shall be that fixed for the car ordered.

In support of said petition, your petitioner respectfully shows:

(1) Petitioner is the duly appointed and acting Secretary of War and as such has control and supervision over the transportation of troops and supplies for the War Department. The War Department is now the largest user of railroad transportation in the United States and petitioner, as Secretary of War, is vitally interested in the maintenance of an adequate and efficient system of railroad transportation as an important factor in the successful prosecution of the war. Petitioner is required to obtain the necessary transportation services by railroad and otherwise for War Department shipments at just and reasonable rates and charges and at the lowest cost consistent wit [*sic*] the furnishing of adequate and efficient service.

(2) Petitioner has adopted and put into effect with respect to the transportation of War Department shipments such policies and practices as will insure the most efficient use of railway facilities and equipment, including the maximum loading of railway freight cars, consistent with military requirements. For example, regulations prescribed by petitioner require that, in ordering cars for War Department shipments, the length of car desired shall be specified, taking into consideration the articles to be shipped and the weight and bulk thereof; and that carload shipments shall be loaded to the load limit or physical capacity, provided that, where a single shipment requires more than one car, no single car in the series required for such shipment shall be loaded below the minimum weight prescribed for the commodity in the carriers' classification and/or applicable tariffs, if the actual weight of the shipment permits of such loading. The Chief of Trans-

portation, acting under the direction of petitioner, on 15 June 1942 issued special instructions requiring War Department shippers and consignees to exert extraordinary efforts to conserve freight car equipment. Such instructions provided more specifically, inter alia, that precautions must be taken to load all cars to maximum carrying capacity or full visible capacity; that cars should not be ordered in excess of actual requirements; that empties should not be held for prospective loading; and that orders for cars should be placed as far in advance as possible, specifying the type and size of car, the time when the car is required, the commodity to be loaded, and the destination. Petitioner has also instituted appropriate measures designed to obtain compliance with these regulations and instructions. Bills of lading for War Department rail carload shipments are checked in the office of the Chief of Transportation to ascertain whether shipments have been made in compliance with such regulations and instructions, particularly with respect to the ordering of cars of proper length and the maximum loading of cars. If it appears that the regulations and instructions have not been complied with in the case of a particular shipment, further investigation is made to determine the circumstances surrounding the shipment and whether non-compliance was due to the nature of the article shipped, the emergency character of the shipment, or to the default of the person making the shipment. Where it is determined that the default of the person making the shipment was responsible for non-compliance, appropriate measures are taken.

(3) The Commission on the 30th day of January 1942 made and entered an order designated as Service Order 68, effective February 15, 1942, providing with respect to interstate commerce for the suspension of

the operation of Rule 24 of Consolidated Freight Classification No. 14, as amended; of Rule 34 of the aforesaid classification in so far as it permitted railway freight cars to be used for the shipment of carload freight otherwise than subject to the carload minimum weight for each car used; and of all provisions in all other tariffs filed by common carriers by railroad with the Commission which, in like manner as, or in modification or extension of, Rule 24 and of that portion of Rule 34 therein suspended, permit railway freight cars (whether such cars are loaded by shipper or carrier) to be used for the shipment of carload freight, including livestock, otherwise than subject to the established minimum weight for each car used. Subsequently, the Commission amended Service Order 68 by vacating it in so far as the order applied to the operation of tariff provisions and car service rules relating to the shipment of livestock. Service Order 68 was made and entered by the Commission as an emergency order upon its own initiative, without notice or hearing, and for the purpose of preventing misuse, wasteful use, and shortage of railway equipment and congestion of traffic.

(4) The War Department makes and receives numerous interstate shipments of carload freight by common carriers by railroad, the transportation charges on which are paid by the War Department. In many instances, particularly in the case of open top equipment, the rail carriers are unable to furnish cars of the length required and ordered, and furnish cars which are greater in length than required and ordered for the transportation of said shipments. Some of the shipments comprise commodities which are light loading, the weight of the quantity to be shipped barely

equaling or being less than the minimum weight for the length of car ordered. Many shipments consist of articles which are of such size and shape that only a certain number can be loaded, regardless of the length of the car furnished. For example, only three gun mounts of a particular type can be loaded in a car, whether the car is 40 or 50 feet long. A great many shipments of War Department freight are of an emergency character and must be loaded and transported promptly in whatever cars are available at the time and place of shipment. Due to the emergency character of the shipments and the inability of the carriers to furnish cars of the length ordered, it is necessary to use the cars furnished by the carriers for the transportation of such shipments, even though the cars are longer than required and ordered and the circumstances of the particular shipment make it impossible to utilize the full capacity of the cars. A considerable number of shipments of this character are subject to Rule 34 of the Consolidated Freight Classification. The provisions of Service Order 68, as amended, require, however, that the carriers assess and collect from the War Department charges based upon the minimum weight established for the length of the car furnished by the carrier and used in the transportation of the shipment, notwithstanding the fact (a) that the minimum weight for the car furnished exceeds the minimum weight for the car ordered and the actual weight of the shipment, (b) that in box cars the loading capacity of the car furnished was not used, and (c) that on open top equipment the lengths of the article or articles shipped were such that they could have been loaded on the car ordered.

(5) Service Order 68, as amended, in so far as it affects shipments made by or to installations of the

War Department, does not result in heavier loading and a more efficient use of railway cars than would exist without said order. On the contrary, and for the reasons previously stated, the application of the order has resulted in the assessment to the War Department of increased transportation charges which are excessive and unjust and unreasonable. Said order has caused, and, so long as it is made applicable to War Department traffic, will continue to cause, a substantial increase in the aggregate amount paid or to be paid by the War Department for transportation services required in the prosecution of the war, a result which, in the opinion of your petitioner, was not contemplated or intended at the time when the order was issued.

(6) Petitioner is unable, from the information now available, to state the precise amount by which the transportation charges of the Department have been increased as a result of said order, but the investigation and spot checks which have been made of shipments at its numerous organizations and installations over an extended period of time indicate conclusively that the amount of such increase has been and will continue to be substantial. Exhibit A, attached hereto and made a part hereof, contains a representative list of shipments on which increased transportation charges have accrued as a result of the application of Service Order 68, as amended.

WHEREFORE, petitioner requests that the Commission reconsider, modify, and set aside Service Order 68, as amended, to the extent that said order suspends, as to shipments made by or to any organization or installation of the War Department, the operation and application of Sections 2 (a) and 6 (a) of Rule 34 of Consolidated Freight Classi-

fication No. 14, as amended and reissued, and of similar provisions in any other tariffs or car service rules filed by common carriers by railroad with the Commission, and that the Commission make such other and further orders as shall be reasonable and proper in the premises.

Dated at Washington, D.C. this 30th day of October 1943.

MYRON C. CRAMER,
Major General,
The Judge Advocate General
for the Secretary of War
By MASTIN G. WHITE
Mastin G. White
Colonel, J. A. G. D.,
Chief, Litigation Division.
3726 Munitions Building

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing petition upon the Association of American Railroads, Washington, D. C., by mailing by first-class mail ten copies thereof, properly addressed to said Association.

Dated at Washington, D. C., this 30th day of October, 1943.

MASTIN G. WHITE
Mastin G. White,
Colonel, J. A. G. D.,
Chief, Litigation Division.
3726 Munitions Building

Exhibit A.

Representative List of Rail Carload Shipments By or To Organizations or Installations of the War Department Showing Increased Charges Resulting from I.C.C. Service Order 68.

No.	Commodity	From	To	Weight (Actual or Tariff Estimated Weight)	Car Ordered: Lgth.	Car Ordered: Minimum	Car Furnished: Lgth.	Car Furnished: Minimum	Freight Charges Assessed Pursuant to I.C.C. Service Order 68	Freight Charges if I.C.C. Service Order 68 had not been applicable	Excess Charges: Amount	Excess Charges: Percent
(a)	Freight—Autos	Ft. Custer, Mich.	Los Angeles, Calif.	18075	50'6"	15,000	53'6"	24,000	$1,274.40	$610.94	$663.46	108.5
(b)	Tractors	Ill.	S.D.	17625	36'0"	24,000	42'0"	29,280	313.30	256.80	56.50	22.0
(c)	Trailers	Fla.	N.Y.	11000	46'0"	28,400	50'0"	32,400	456.84	400.44	56.40	14.1
(d)	Road Roller	Ohio	Ga.	20000	40'0"	26,880	46'0"	34,080	402.14	317.18	84.96	26.8
(e)	Army Half Tracks	Ill.	Ohio.	28000	40'0"	26,880	45'0"	39,080	85.92	61.60	24.32	39.5
(f)	Trailers	Mich.	Calif.	18000	36'0"	24,000	46'0"	28,400	564.00	530.35	33.65	6.4
(g)	Passenger Autos	N.Y.	Calif.,	6835	36'0"	10,000	50'0"	12,000	636.00	530.00	106.00	20.00
(h)	Freight Autos	Wisc.	Ga.	24000	50'0"	12,500	2-42'	25,000	512.50	492.00	20.50	4.2
(i)	Oil Heaters	Iowa	Calif.	15892	40'0"	20,000	50'0"	24,000	420.00	350.00	70.00	20.0

Appendix B.

BEFORE THE
INTERSTATE COMMERCE COMMISSION
SERVICE ORDER No. 68

RAILROADS' REPLY TO PETITION OF SECRETARY OF WAR.

Now come the railroads, parties to Consolidated Classification No. 14, and in reply to the petition of the Secretary of War for reconsideration and modification of Service Order No. 68 respectfully state.

The petition is without merit and should be denied. Service Order No. 68 is but one of many service orders that have been issued by the Commission during the present war emergency, all aimed at the common purpose of avoiding a breakdown in rail transportation. Its particular purpose is to aid in the conservation of equipment by avoiding unnecessary delay on the part of the railroads in supplying cars for loading and by encouraging the maximum utilization of such cars as are readily available for use. It operates in the interest of all shippers, including the War Department and other departments and agencies of the Government. Indeed, in view of the present volume of Government traffic and of the vital importance of rail transportation in the successful prosecution of the war, it may be said that the order operates in the interest of the Government above all.

While it may well be true that some of the traffic of the War Department is of such character as to make it impossible to load any more in a large than in a small car, it is difficult to accept the statement of the Secretary of War

that such is true of all its traffic. In any event, as already stated, the heavier loading of cars is but one objective of the order. An equally important purpose is the avoidance of unnecessary delays and unnecessary switching and other operations in filling orders for cars. To the extent that it accomplishes either purpose, the increased charges which it imposes upon the War Department represent but a small price for the Government to pay for the benefits accruing to it therefrom.

Both in the interest of accomplishing its purpose and in the interest of treating all shippers alike, the order should continue to apply to all departments of the Government. It is to be remembered that we are not here considering a tariff rule established by the railroads, but an emergency regulation prescribed by the Commission. Certainly the Government should not put itself in the position of prescribing a rule for application to shippers generally to which it as a shipper, is not willing to conform.

Respectfully submitted,

J. M. SOUBY

Attorney for above named railroads

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the Secretary of War by mailing by first-class mail a copy thereof to his attorney, Colonel Mastin G. White, 3726 Munitions Building, Washington, D. C.

Dated at Washington, D. C. this ninth day of November, 1943.

J. M. SOUBY

J. M. SOUBY

Appendix C.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D.C., on the 6th day of March, A.D., 1944.

In Re: Service Order No. 68.

Upon further consideration of the provisions of Service Order No. 68, as amended, and the petition of the Secretary of War, dated October 30, 1943, requesting "that the Commission reconsider, modify, and set aside Service Order No. 68, as amended, to the extend [*sic*] that said order suspends, as to shipments made by or to any organization or installation of the War Department, the operation and application of Sections 2 (a) and 6 (a) of Rule 34 of Consolidated Freight Classification No. 14, as amended and reissued, and of similar provisions in any other tariffs or car service rules filed by common carriers by railroad with the Commission":

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel,
W. P. Bartel,
Secretary.

(SEAL)